

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstance allowed under Rule 23(e)(1).

No. 3--10--0277

Order filed April 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

PAMELA DENNIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit
Plaintiff-Appellant,)	Rock Island County, Illinois
)	
v.)	No. 09--L--13
)	
WINSTEIN, KAVENSKY & WALLACE,)	
ROBERT K. LEYSHON, JOHN)	
MALVIK, and CRAIG L. KAVENSKY,)	
)	Honorable Mark A. Vandeweile,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in
the judgment.

ORDER

Held: The trial court erred in granting summary judgment because issues of material fact remain as to whether actions of defendant attorneys proximately caused damages to plaintiff, notwithstanding Plaintiff's retention of successor counsel.
Reversed and remanded.

Pamela Dennis appeals the grant of summary judgment on behalf of Winstein, Kevensky & Wallace, Robert Leyshon, John Malvik, and Craig Kevensky. Dennis sued defendants for negligent handling of her underlying medical malpractice case. The trial court granted summary judgment to defendants on the grounds that Dennis could not establish proximate cause because the underlying action was viable when new counsel entered its appearance on Dennis's behalf. Dennis raises two issues. First, whether questions of fact exist regarding the viability of the underlying action at the time additional counsel entered his appearance. We find that questions of material fact do exist. The second issue raised by Dennis is whether questions of material fact exist concerning whether defendants breached the standard of care by advising Dennis to accept a wholly inadequate settlement. We find that our resolution of the first issue obviates our need to address this issue.

FACTS

A. Underlying Case

In May 2003, Dennis's physician sent samples from a

breast biopsy to Metropolitan Medical Laboratory for testing. The lab tested the sample and reported finding cancer. Dennis's physician told her she had breast cancer and scheduled her for surgery. On June 11, 2003, Dennis underwent surgery; the surgeon removed several lymph nodes and some breast tissue. The same lab tested tissue removed during surgery; all tested negative for cancer. On June 26, 2003, the lab informed Dennis's physician that the lab had mislabeled the sample from the initial biopsy and that Dennis was misdiagnosed with cancer. Two different doctors from the lab informed Dennis's doctor that the lab had made an error.

B. Prior Counsel

On December 3, 2004, Dennis retained Robert Leyshon of the law firm of Winstein, Kavensky & Wallace to represent her in a suit against Metropolitan Medical Laboratory. Her attorneys originally told Dennis that the value of her case was around \$500,000. Dennis entered into a contingent fee agreement (agreement) with defendants. The relevant provisions in the agreement are:

- "(1) The firm will use its best efforts in pursuing the client's claims.
- (2) The client agrees that the firm will be compensated on the following contingent fee basis:

- (b) 33 1/3% of all amounts recovered from and after the date of filing suit whether before, during, or after trial[.]

- (3) In addition to the contingent fee agreement set forth above, the client agrees to reimburse the law firm of all necessary costs and expenses [sic] may be advanced by the firm from time to time, however, they remain the obligation of the client.
- (4) If there is no recovery there will be no attorney fees, but client will still have

to reimburse the attorney for any costs and expenses.

- (5) The client will have the right to terminate the services of the firm on written notice to the firm to that effect. In that event, the firm will be entitled to payment for legal services rendered to that point on an hourly basis for all hours so employed, which shall be paid at the rate that is normally and customarily charged for services of this nature by the individual attorneys.
- (6) The firm shall have the right to terminate its services on written notice to that effect in the event that the client fails to cooperate with any reasonable request of the firm or the firm determines in its reasonable discretion that it would be impractical or unwise to continue its services to the client. In that event, the firm agrees to provide assistance to

the client in retaining counsel.

- (7) The client agrees to consider any recommendation for settlement that the firm makes and agrees not to withhold unreasonably consent to such a settlement proposal. The client further agrees not to settle this lawsuit without the consent of the firm, which consent shall not be unreasonably withheld.
- (8) The client understands that there have been no promises or representations made other than what is specifically set forth in this fee agreement. The client further understands and agrees that the firm does not guarantee the outcome of these claims.

- (10) The client understands and agrees that the firm shall have a lien on any sum or sums recovered, whether by settlement or judgment,

for legal services and costs and expenses advanced under this fee agreement."

During the course of trial preparation, defendants' attorneys secured the evidence deposition of Dr. Wagle, one of Dennis's treating physicians. Dr. Wagle treated Dennis for complaints of left arm pain which she originally opined were secondary to the surgery. Defense attorneys presented Dr. Wagle with records from additional treating physicians. These records established that Dennis was not making the same complaints of arm pains to her other doctors. Dr. Wagle then testified that she could not medically relate the complaints to the surgery.

Defendants claim that this change of opinion radically altered the worth of the suit. Leyshon sent Dennis a letter indicating that her medical records showed that the pain in her arm did not appear until three months after surgery and that this would give the appearance that Dennis was fabricating a claim for nerve damage.

Apparently, Leyshon concluded that Dennis's failure to complain to a physician of arm pain during the first three

months following the surgery diminished her claim by \$450,000 or 90%. On October 20, 2006, Leyshon indicated that he would like to try and settle the case for \$50,000 and that if Dennis did not settle the case the firm would no longer advance the costs of litigation. The letter indicated that the cost to further litigate the case would be \$5,000.

Within a month of the letter being sent, Leyshon was disciplined by the Supreme Court of Illinois for purchasing and using cocaine. He received a one-year suspension from the practice of law, but the suspension was stayed and he was placed on two years of probation.

At some point after this, Leyshon left the firm, and Kavensky and Malvik informed Dennis of a settlement offer of \$15,000. They also told her that it was too late to obtain an expert for her case and they recommended she accept the settlement. She claims she was never told about Leyshon's problems or given any alternatives.

Because of the recommendation, Dennis agreed to settle the case, signed a release on January 30, 2007, and the

following day, January 31, 2007, the trial court issued a dismissal order. Within two days, Dennis went to her attorney's office to sign the settlement check. She claims that is when she learned she would not receive any money from the settlement and changed her mind. She then informed her attorneys that she did not want to settle the case and refused to sign the check.

On February 9, 2007, within a week, defendants, Dennis's own attorneys, filed a petition to enforce settlement and release. They did not inform her that they would no longer be acting as her attorneys. They never filed a motion to withdraw. They were never discharged by Dennis.

Defendants scheduled a hearing on the motion to enforce. The trial court continued the hearing twice to allow Dennis time to obtain new counsel. Floyd Wisner represented her at the hearing. Metropolitan Medical Laboratory's counsel advised the court that Dennis had not disclosed any experts in the medical malpractice case. He also stated that the deadlines had passed for disclosing any

experts. This, of course, raises a question as to whether defendants breached their duty to properly prepare the underlying case for trial.

Wisner argued that defendants should have withdrawn instead of filing a petition to enforce against their own clients. He further argued that defendants' representation of Dennis was negligent because defendants told Dennis she would lose this case at trial. Wisner then points out that it would be almost impossible to lose the case because the lab has basically admitted liability.

The defendants argued that the settlement was fair considering the fact the Dennis had no experts (Query: Did they expect their client to retain any necessary experts?) and it appeared she had overstated some of her injuries. They also pointed out that Dennis would have to obtain a judgment in excess of \$100,000 before she would receive any money in her case. Defendants explained that this would be due to the cost to obtain experts (even though they agreed it was too late to get any experts) and to repay existing liens and a litigation loan. Defendants argue that after

all liens, costs, fees and other expenses were paid back, Dennis received \$28,500 from this case, which represents the amount she received from a litigation loan. Defendants' opinion was that the suit was of no additional value to Dennis unless they could obtain over \$100,000. They say that Dennis was aware that she would receive no money from the \$15,000 settlement except for the money she had from the loan. Defendants argue that she was aware of all of these facts and chose to sign the release. A summary judgment motion, of course, is not the vehicle to resolve disputed questions of fact.

Wisner replied that even if we ignore everything besides the unnecessary surgical removal of Dennis's breast tissue and lymph nodes, the attendant \$20,000 in bills, and the fact that Dennis was told that she had cancer and lived with that for a month before finding out that she did not have cancer, this case is worth more than \$15,000. He also disagrees with the assertion that Dennis received \$28,500 from the settlement.

On June 11, 2007, the trial court conditionally granted

the motion to enforce the settlement. The court's order stated, "Ms. Dennis shall have until July 13, 2007 to tender to the Winstein firm the costs advanced and the fees earned as if the case had been settled for the \$15,000." The court would reinstate the case upon payment by Dennis. In its order, the trial court recognized that it was too late for Dennis to present expert witnesses at trial. Dennis filed a *pro se* appeal that was dismissed by this court on procedural grounds.

Dennis then filed this case alleging legal malpractice, including multiple negligent acts and omissions. Defendants moved for summary judgment before any discovery had taken place. They claim that Dennis cannot establish a claim for legal malpractice because she did not sustain any damages and defendants were not the proximate cause of her injuries.

Dennis's response to the motion included her affidavit indicating that since December of 1998, her income was social security disability which provided \$632 per month. The affidavit also stated that Dennis did not have significant savings and was unable to pay the fees and

expenses based on a settlement of \$15,000.

The circuit court granted summary judgment on the basis that Dennis cannot establish that defendants were the proximate cause of her injuries.

ANALYSIS

A. Summary Judgment

Dennis appeals the grant of summary judgment. Motions for summary judgment are governed by section 2-1005 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-1005 (West 2008). "Pursuant to that statute, summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008)." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399-400 (2010). "The granting of summary judgment is reviewed *de novo*." *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 573 (2009) (citing *Murray v. Chicago Youth*

Center, 224 Ill. 2d 213, 228 (2007)).

B. Legal Malpractice

This action is one for legal malpractice. The elements required to prove legal malpractice are: (1) a duty, due to an attorney-client relationship; (2) breach of that duty; (3) damages; and (4) proximate cause. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225-26 (2006); *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199 (2006). The circuit court granted summary judgment in this case on the grounds that Dennis could not prove proximate cause. That is, the court ruled that the appearance by attorney Wisner broke any possible proximate cause connections. The first issue raised by Dennis is whether the circuit court correctly decided that no question of material fact exists with regard to the issue of proximate cause.

I. Proximate Cause

Proximate cause itself is comprised of two elements: "cause in fact and legal cause." *Young v. Bryco Arms et al.*, 213 Ill. 2d 433, 446 (2004). The cause in fact element

is satisfied when it is "reasonably certain that a defendant's acts caused the injury or damage." (Internal quotation marks omitted.) *Id.* Legal cause is found only "if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it." (Internal quotation marks omitted.) *Id.* This is a question of foreseeability. Is the injury one that a reasonable person in the defendant's situation would "see as a likely result of his conduct?" (Internal quotation marks omitted.) *Id.* at 446-47.

Generally, proximate cause is a question of fact. *Id.* at 447; *Judge*, 221 Ill. 2d at 210. But, if the plaintiff can present no set of facts that establish proximate cause, the trial court can decide the issue as a matter of law. *Shehade v. Gerson*, 148 Ill. App. 3d 1026, 1029 (1986).

"If the underlying cause remained actionable at the time plaintiffs hired successor counsel," there is no proximate cause between the original counsel's negligence and the plaintiff's damages. *Webb v. Damisch*, 362 Ill. App.3d 1032, 1038 (2005) (citing *Cedeno v. Gumbiner*, 347

Ill. App. 3d 169, 174 (2004) ("If the underlying cause remained actionable upon the discharge of the former attorney, plaintiff can prove no set of facts which connect defendant's conduct with any damage plaintiff sustained."); *Land v. Greenwood*, 133 Ill. App. 3d 537, 541 (1985) (holding that since the underlying cause of action was viable at the time of discharge proximate cause cannot be shown as a matter of law).

"Where the viability of a plaintiff's claim following discharge of the first attorney is in dispute, summary judgment is not appropriate. *Sobilo v. Manassa*, 479 F. Supp. 2d 805, 816 (N.D. Ill. 2007); *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 621 (2002) ("We recognize that there may be circumstances where the first attorney could be held to be a proximate cause of plaintiff's damages where his acts or omissions leave doubt about the subsequent viability of plaintiff's claim after his representation ends."). Summary judgment is not appropriate in this case because questions of material fact exist concerning when, or if, defendants withdrew or were

discharged, and whether at that time the underlying case was still viable.

A. Viability

The circuit court held that the underlying action was viable because the court allowed Dennis to continue her medical malpractice case if she paid defendants their fees and costs based on a \$15,000 settlement. The record does not indicate what the costs would have been, but Dennis would have had to pay \$5,000, which is one-third of the \$15,000, plus the unknown costs. Her uncontested affidavits indicate she did not have the funds to make such a payment to successor counsel. So, while the underlying action may have been theoretically viable, it may not have been viable to Dennis.

Even if we assume that Dennis could have made such a payment, it does not necessarily follow that the underlying case was viable. According to Dennis, when defendants convinced her to settle for \$15,000, they told her it was too late to obtain an expert for her case. If defendants failed to timely obtain an expert, then whether or not the

case could have gone forward remains a question of fact. Would the trial judge have granted successor counsel an extension to retain an expert? We cannot say, as a matter of law, that the underlying case was viable when defendants here decided to quit representing their client.

Defendants claim the appeal of the underlying action proves the cause was still viable. We disagree. An appeal does not prove that the underlying complaint was still viable. This court has held that a "legal malpractice plaintiff does not have the burden to prove the exhaustion of all avenues of appeal on the underlying claim in order to state a legal malpractice claim." *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill. App. 3d 469, 475 (1975); see *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990); *Zupan v. Berman*, 142 Ill. App. 3d 396, 398-99 (1986). The fact that Dennis attempted to appeal the decision of the trial court on the underlying action does not establish the action was viable¹.

¹Dennis filed a *pro se* appeal which was dismissed on the basis of her failure to comply with appellate procedural

The viability of the underlying action in this case is a question of fact. Even if the court finds that the action was technically viable, it could still find that the value of the action was much less than it should have been due to the actions of defendants; this is a question of fact as well. That is, did the actions of Dennis's counsel in failing to retain experts, either extinguish or severely limit Dennis's opportunity to recover? Summary judgment was not proper because questions of fact exist regarding whether defendants were the proximate cause of Dennis's damages. In saying this, we note that virtually no discovery has been conducted in this case.

B. Withdrawal

A question of fact also exists as to when defendants ceased to have a duty to Dennis. Our case law regarding proximate cause and successor counsel is based on fact patterns where the original counsel had withdrawn or was discharged by the client. Here, it is clear that defendants took positions opposed to Dennis. But a question of fact

rules.

remains as to when their duty to Dennis terminated.

Illinois Supreme Court Rule 13 (eff. July 1, 1982) regulates how and when attorneys may withdraw from representation. It says, "An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, unless another attorney is substituted, he must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw ***." Ill. S. Ct. R. 13(c)(2) (eff. July 1, 1982)

Illinois Rule of Professional Conduct 1.16 limits an attorney's ability to withdraw from representation. The rule lists a number of reasons counsel may withdraw from representation. It specifically requires that "a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client ***." Rule 1.16(d) (eff. Aug. 1, 1990).

Defendants argue that they cannot be the proximate cause of Dennis's injuries because she obtained additional counsel. (Query: What else could Dennis have done once her

own attorneys filed a motion to enforce the settlement with which she no longer agreed?) They have never shown that they complied with the requirements of Supreme Court Rule 13 and Illinois Rules of Professional Conduct 1.16(d). It is unclear when defendants' obligation to Dennis terminated. Until they have withdrawn from representation, their duty to Dennis still exists and does not bar them from being the proximate cause of Dennis's injuries.

Another indication that defendants never ended their representation of Dennis is the lack of evidence that they complied with their duties under the agreement. The agreement between defendants and Dennis allowed the defendants to cease representing Dennis, but according to the agreement, defendants were obligated to give written notice and to help Dennis find new representation if they chose to cease representing Dennis. Defendants have presented no evidence they gave written notice to Dennis or that they assisted her in obtaining new counsel.

It seems that defendants acted in their own interest and not on behalf of Dennis when they prosecuted the motion

to enforce settlement. The requirement that Dennis pay her own attorneys within 30 days as a condition to proceed with the underlying suit is surprising. A lien would have sufficed. We believe this is not only contrary to the rules, but also the terms of the contract between the parties. It would be dangerous precedent to say that even though defendants represented Dennis, once their actions became obviously hostile to her, their duty to her ceased. Such a holding would require this court to ignore the Rules of the Supreme Court of Illinois and the Illinois Rules of Professional Conduct. An attorney's duty to his or her client does not terminate whenever the attorney decides to publicly take a position at odds with the client's wishes. For the reasons set forth above, summary judgment is reversed.

II. Remaining Issues

Since we have found that summary judgment was improvidently granted, we need not address the remainder of the issues raised by Dennis.

III. Considerations on Remand

Supreme Court Rule 366(a)(5) permits this court "to make any order or grant any relief that a particular case may require." *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002). "This authority includes the power to reassign a matter to a new judge on remand." *Id.* In order to avoid any appearance of bias that might be raised because the judge is hearing a malpractice case which involves conduct that occurred before him, on remand, this case is to be assigned to a new judge. In so ordering, we in no way mean to question either the integrity or ability of the trial judge.

CONCLUSION

Summary judgment is not proper in this case. Questions of fact remain as to the viability of the underlying action and the existence of defendants' duty to Dennis. We reverse the grant of summary judgment and remand for further proceedings before a new judge.

For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed and the cause remanded.

Reversed and remanded with instructions.