2016 IL App (1st) 143904-U

FIFTH DIVISION
September 16, 2016

No. 1-14-3904

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

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FREDERICK D. SLATER,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 2012 L 4521
	)	
MICHAEL FREEMAN, ESQ. and	)	The Honorable
MICHAEL A. HABER, ESQ.,	)	Moira Johnson ,
	)	Judge Presiding.
Defendants	)	
	)	
(Michael A. Haber, Esq.	)	
	)	
Defendant-Appellant).	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: The order granting the petition for Rule 308 interlocutory appeal is vacated, and this appeal is dismissed because this court improvidently granted the petition for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016): the certified questions do not present questions of law for which there is a substantial difference of opinion and the matter does not otherwise satisfy Rule 308.

¶ 2 This is a permissive appeal under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015). Pursuant to the parties' agreed order, the circuit court of Cook County certified two questions to this court. On December 30, 2014, defendant Michael A. Haber filed a petition for leave to appeal, which was granted by this court on January 21, 2015. For reasons that follow, we vacate the order granting leave to appeal and dismiss the appeal.

¶ 3 BACKGROUND

¶ 4 On April 27, 2012, the plaintiff, Frederick D. Slater, filed a complaint for legal malpractice against the defendants, attorney Michael Freeman and attorney Michael A. Haber (attorney Haber). The complaint contained the following factual allegations.

¶ 5 In 1987, a judgment for dissolution of marriage was entered in the circuit court of Cook County ending the marriage of the plaintiff and Terri S. Slater (Terri). Both parties were represented by counsel: the plaintiff by attorney Freeman and Terri by attorney Haber. The judgment incorporated the martial settlement agreement (MSA), which had been drafted by attorney Haber.

¶ 6 Terri died in 1999. The plaintiff became disabled and applied for social security benefits under section 402 of the Old-Age, Survivors, Disability Insurance Benefits Statute (federal statute) (42 U.S.C.A. §402 *et seq.* (2015)). The federal statute provided that a divorced spouse was entitled to the old-age insurance benefits of a deceased former spouse. The plaintiff learned that because Terri and he had been married less than 10 years, he was not entitled to benefits under the federal statute. See 42 U.S.C.A. §416(d)(5) (2004).

¶ 7 In count II[1] of the complaint, the plaintiff alleged that because attorney Haber drafted the MSA he owed a duty to the plaintiff to include in the MSA the rights that both parties would have under the federal statute. The plaintiff alleged that attorney Haber was negligent in that he: (1) failed to provide the plaintiff with proper legal representation when he drafted the MSA; (2) failed to provide the plaintiff with proper legal advice when the plaintiff signed the MSA; (3) failed to notify the plaintiff of his rights under the federal statute; (4) failed to advise the plaintiff that he would have been entitled to benefits if he had remained married to Terri for ten years; (5) failed to warn the plaintiff that by entering the judgment two days prior to the 10-year period, he would not be eligible for benefits.

¶ 8 The plaintiff alleged that attorney Haber's representation of the plaintiff fell below the standard of care applicable to the practice of law and was the direct cause of the plaintiff's inability to receive the compensation due him under the federal statute. The plaintiff requested damages in excess of $50,000.

¶ 9 Attorney Haber filed a motion for summary judgment asserting that there was no attorney-client relationship between the plaintiff and him and therefore, he owed no duty to the plaintiff. Attorney Haber further asserted that the plaintiff's cause of action was barred by the statute of repose applicable to legal malpractice. See 735 ILCS 5/13-214.3(c) (West 2012). In his response to the motion, the plaintiff argued that under certain factual situations, courts found that an attorney/client relationship was not always necessary to impose a duty of care on an attorney. The plaintiff further argued that he could not have known of his injury until he reached the age of 60, the statutory eligibility age. He maintained that the statute of limitations applicable to legal malpractice did not begin to run until he became aware that he

[1]Count I of the complaint was directed against attorney Freeman, who is not a party to this appeal.

was not eligible for benefits because of attorney Haber's negligence and suffered damages based on his lack of eligibility.

¶ 10 The circuit court denied attorney Haber's motion for summary judgment and denied his motion for reconsideration of that ruling. On December 17, 2014, the circuit court entered an agreed order submitted by the parties and certified the following questions :

> "1. In a domestic relations lawsuit, is there a duty imposed upon the drafter of a Marital Settlement Agreement ('MSA') drafted by one of the parties' attorney and to be signed by both parties, and which is to be incorporated into the Judgment of Dissolution of Marriage, to inform both the Petitioner and Respondent as to the law applicable to that MSA?
>
> and
>
> 2. When would the Statute of Repose for a Legal Malpractice action trigger or commence running relative to the Old Age and Survivors Insurance Benefit Payment Statute; upon the entry of the Judgment for Dissolution of Marriage, or when the benefits under the Old Age and Survivors Insurance Benefit Payment Statute would otherwise become available?"

¶ 11 On December 30, 2014, attorney Haber filed a petition for leave to file an interlocutory appeal pursuant to Rule 308. On January 21, 2015, this court granted the petition.

¶ 12 ANALYSIS

¶ 13 Rule 308 is an exception to the general rule that only final orders are subject to appellate review. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (2002). Pursuant to Rule 308, a reviewing court is authorized to allow an appeal of an interlocutory order where the trial court finds and states in writing that "the order involves a question of law as to which

there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2015). Rule 308 was intended to be used sparingly and limited to those special circumstances set forth in the rule. *Thomas v. Page*, 361 Ill. App. 3d 484, 494 (2005). "The rule was never intended to serve as a vehicle to appeal interlocutory orders involving little more than an application of the law to the facts of a specific case." *Thomas*, 361 Ill. App. 3d at 494.

¶ 14 Prior to considering an appeal on its merits, we must determine whether the appeal has properly invoked our jurisdiction. *Voss v. Lincoln Hall Management*, 166 Ill. App. 3d 442, 451 (1988) (the question of jurisdiction is always open). We may reconsider the question of jurisdiction if the granting of leave to appeal seems erroneous. *Voss*, 166 Ill. App. 3d at 451. After review of the entire record and consideration of the arguments of the parties contained in their briefs, we determine that leave to appeal was improvidently granted in this case.

¶ 15 With regard to the first certified question, our supreme court has held that in cases which are adversarial in nature, such as dissolution proceedings, "in order to create a duty on the part of the attorney to one other than a client, there must be a clear indication that the representation by the attorney is intended to directly confer a benefit upon the third party." *Pelham v. Griesheimer*, 92 Ill. 2d 13, 23 (1982). The court recognized that imposing such a duty on an attorney to another person "would interfere with the undivided loyalty which an attorney owes his client and would detract from achieving the most advantageous position for his client." *Pelham*, 92 Ill. 2d at 22. The court held that in order to establish a duty, the plaintiff must plead and prove that the relationship between the attorney and his client was entered into for the primary and direct benefit of the plaintiff. *Pelham*, 92 Ill. 2d at 24-25.

For example in *In re Estate of Powell*, 2014 IL 115997, the surviving spouse retained the defendants-attorneys to bring a wrongful death suit on behalf of the children of the deceased as well as herself. Because the Wrongful Death Act (740 ILCS 180/1 *et seq.*(West 2012) (Act)) created a cause of action for the deceased's spouse and next of kin, the supreme court held that the attorneys owed a legal duty to the children as intended beneficiaries under the Act. *Estate of Powell*, 2014 IL 115997, ¶ 20.

¶ 16 By denying summary judgment to attorney Haber, the circuit court indicated that there were questions of fact as to whether by undertaking to draft the MSA, attorney Haber intended to confer a benefit on the plaintiff. In the case before us, the first certified question encompasses factual issues inappropriate for consideration under Rule 308. See *Morrissey*, 334 Ill. App. 3d at 258 (certified question did not involve a question of law; the underlying order denying summary judgment was based on the existence of facts, and the question, as phrased, involved factual considerations).

¶ 17 As to the second question, there is no substantial ground for difference of opinion as to the applicable law. The plaintiff alleged that he did not discover his injury until he applied for benefits. Unlike a statute of limitations, the six-year statute of repose begins to run when the event creating the malpractice occurs, "regardless of whether any injury has yet resulted so as to cause an action to accrue." *Mauer v. Rubin*, 401 Ill. App. 3d 630, 639 (2010). The fact that a statute of repose bars an action before it accrues is not fundamentally unfair because a statute of repose " 'is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his or her cause of action.' " *Mauer*, 401 Ill. App. 3d at 639 (quoting *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001)).

¶ 18 CONCLUSION

¶ 19 The interlocutory order in this case did not involve the exceptional circumstances required for an appeal pursuant to Rule 308(a). In particular, since this case remains pending against defendant Freeman, an immediate appeal "may not materially advance the ultimate termination of the litigation." Ill. S. Ct. Rule 308(a) (eff. Jan. 1, 2015). The certified questions presented require only the application of existing law to the specific facts in this case. The law's strong policy against piecemeal appeals requires that we vacate our January 21, 2015, order allowing this interlocutory appeal and dismiss this appeal. *Voss,* 166 Ill. App. 3d at 451-52.

¶ 20 Appeal dismissed.