FOURTH DIVISION
June 16, 2016

Nos. 1-15-2910 and 1-15-2940, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT HERRING, Plaintiff-Appellee, v. KEVIN GALLAGHER and GALLAGHER LAW, P.C., TERRANCE NOFSINGER and MCNABOLA LAW GROUP, P.C., Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 15 L 2517 Honorable William E. Gomolinski, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 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 interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015); the certified questions presented encompass factual issues inappropriate for consideration under Rule 308.

¶ 2 Plaintiff, Robert Herring, filed a complaint for legal malpractice against defendants, Kevin Gallagher and Gallagher Law, P.C. (collectively, "Gallagher"), and Terrance Nofsinger

and the McNabola Law Group, P.C. (collectively, "Nofsinger"), for the handling of plaintiff's workers' compensation claim. Defendants moved to dismiss plaintiff's malpractice complaint on the grounds plaintiff failed to list the workers' compensation case in a bankruptcy petition, therefore plaintiff lacked standing in the workers' compensation proceedings; and plaintiff took a contrary position regarding his workers' compensation claim in his bankruptcy, therefore plaintiff is judicially estopped from pursing the workers' compensation claim or the "auxiliary malpractice claim."

¶ 3 The trial court denied defendants' motions to dismiss and certified two questions for appeal:

(1) If a plaintiff seeking workers' compensation recovery informs his attorney of his intent to file for bankruptcy, does that workers' compensation attorney have a duty, under a legal negligence theory, to advise his client of the disclosure requirements in the bankruptcy proceeding regarding the claim for which the attorney was retained?

(2) If such a duty exists, could the attorney then assert the affirmative defenses of standing or judicial estoppel in a motion to dismiss pursuant to 735 ILCS 5/2-619, when the attorney's alleged malpractice of failing to advise plaintiff of the disclosure requirements creates the basis for both affirmative defenses?

¶ 4 For the following reasons, we hold that this court improvidently granted leave to appeal because this matter concerns factual issues inappropriate for consideration under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015). Accordingly, we vacate our previous order and dismiss the appeal.

¶ 5 BACKGROUND

¶ 6 In 2005 plaintiff retained Gallagher to pursue a workers' compensation claim. Gallagher filed an application for adjustment of that claim. Plaintiff alleged that in 2012, he advised Gallagher of his intent to file bankruptcy and later informed Gallagher he had in fact filed for bankruptcy. Plaintiff's complaint alleged in part that defendants did not advise plaintiff of plaintiff's obligation to disclose his workers' compensation claim in his bankruptcy petition, did not advise plaintiff's bankruptcy attorneys of plaintiff's workers' compensation claim, and did not move to substitute plaintiff for the trustee in bankruptcy as the petitioner in the workers' compensation proceeding. Plaintiff did not disclose his workers' compensation claim in his bankruptcy petition. In June 2012 plaintiff's debt was discharged and the bankruptcy proceeding was closed. In January 2013 Gallagher referred the workers' compensation claim to Nofsinger. In July 2013 the workers' compensation claim was dismissed for want of prosecution. Both Gallagher and Nofsinger filed petitions to reinstate the workers' compensation claim but those petitions were denied. In September 2014 the Workers' Compensation Commission (Commission) affirmed the denial of the petitions to reinstate.

¶ 7 In April 2015 plaintiff filed an amended complaint against Gallagher and Nofsinger alleging defendants were negligent in: failing to represent plaintiff in the workers' compensation proceedings; failing to advise plaintiff that he was obligated to disclose the workers' compensation claim in his bankruptcy petition; and failing to inform, advise, or disclose the workers' compensation claim to plaintiff's bankruptcy attorneys.

¶ 8 Defendants both filed motions to dismiss plaintiff's amended complaint. Gallaher's motion argued that the complaint must be dismissed because (1) plaintiff was divested of standing to pursue the workers' compensation claim when he failed to schedule the claim in the bankruptcy petition, therefore plaintiff cannot prove the "case-within-a-case" to sustain his

malpractice action; (2) plaintiff received the benefit of being discharged in bankruptcy without notifying his creditors of the workers' compensation claim, therefore plaintiff is judicially estopped from pursuing that claim or the auxiliary malpractice claim in another proceeding; and (3) it was under no duty to advise plaintiff with respect to his bankruptcy especially since Gallagher was retained only to handle the workers' compensation claim and plaintiff retained separate counsel for the bankruptcy proceeding. Nofsinger's motion to dismiss the amended complaint argued that plaintiff lacks standing to pursue an action for legal malpractice because that claim became the property of the bankruptcy estate upon the filing of the bankruptcy petition, and plaintiff's malpractice claim is barred by judicial estoppel.

¶ 9 Following briefing and arguments the trial court denied defendants' motions to dismiss. During arguments, the trial court commented as follows:

> "THE COURT: Here is the issue that I have. It's a very unique circumstance this case. And I have a question as to whether or not there is a duty if I tell plaintiff's counsel that I'm filing bankruptcy, and plaintiff's counsel goes forward to prosecute the workers' compensation case and to continue to represent me and to try and gain me a recovery even though I know that he is filing a bankruptcy.
>
> * * *
>
> The question is whether or not there is any duty that that attorney may have once he gets that knowledge to do something further.
>
> * * *
>
> That's the question that I have. I think there is a duty for that."

¶ 10 The trial court found that its order involves questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. See Ill. S. Ct. R. 308 (eff. Jan. 1, 2015). The court certified the two questions of law stated above. On November 20, 2015 this court granted defendants' application for leave to appeal.

¶ 11 ANALYSIS

¶ 12 Supreme Court Rule 308 authorizes this court to allow appeal of interlocutory orders not otherwise appealable if an appropriate application is filed and the trial court has found (1) that the order involves a question of law as to which there is substantial ground for difference of opinion and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 444 (1988). Appeals under Rule 308 should be limited to certain "exceptional" circumstances; the rule should be strictly construed and sparingly exercised. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 258 (2002). "Prior to considering an appeal on its merits, we must determine if the appeal has been properly taken so as to invoke our jurisdiction. ([Citations.]) The question of jurisdiction is always open. ([Citation.]) Just as a writ of *certiorari* might be quashed if improperly issued ([citations]), we may reconsider the question of our jurisdiction if our earlier ruling seems erroneous ([citations])." *Voss*, 166 Ill. App. 3d at 451. Assuming the facts as presented by the parties, and having reviewed the supporting record as well as the parties' briefs, we conclude the petition for leave to appeal was improvidently granted.

¶ 13 The certified questions as framed by the trial court improperly request that this court render an advisory opinion based on the factual circumstances of plaintiff's case. As a rule courts will not render advisory opinions. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460,

469 (1998). Rule 308 "was not intended to allow for an interlocutory appeal of merely an application of the law to the facts of a specific case." *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008). That is what we have here.

¶ 14 In *Dowd & Dowd, Ltd.*, our supreme court declined to answer a certified question. The court found that although the matter in that case was "framed as a question of law, *** any answer here would be advisory and provisional, for the ultimate disposition *** will depend on the resolution of a host of factual predicates." *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 469. We believe that the same principle applies to the certified questions here. The disposition of this case depends on the resolution of a host of factual predicates this court cannot answer; therefore, "[a]ny answer we could give to the certified question[s] would be equivocal, as well as, 'advisory and provisional.' [Citations.]" *Morrissey*, 334 Ill. App. 3d at 258 (citing *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 469). "To prevail in an action for legal malpractice, plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that 'but for' the attorney's malpractice, plaintiff would have prevailed in the underlying action; and (4) actual damages." *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 174 (2004).

¶ 15 In this case there is no doubt as to the existence of an attorney-client relationship that established a duty to plaintiff on the part of defendant attorneys. A duty exists where "the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Kirk v. Michael Reese Hospital and Medical Center*, 117 Ill. 2d 507, 525 (1987). The duty of care required of an attorney is to exercise a reasonable degree of care and skill in the representation of

his clients. *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill. App. 3d 115, 130 (1999). Here, defendant attorneys owed plaintiff a duty to exercise a reasonable degree of care and skill because of their relationship to him as his attorney. Viewed with that predicate in mind, the trial court's question asks whether there is a "duty" to a client with regard to the matter for which the attorney was retained, and whether a separate duty is created when an attorney learns, through the attorney-client relationship, information about his client which has legal implications. What the certified question seeks to actually determine is whether defendant attorneys *breached their duty of care to their client* when they did not instruct plaintiff to disclose his workers' compensation claim in his bankruptcy petition or to his bankruptcy attorneys. Thus, the real issue presented in this appeal is a question of fact: whether defendants *deviated from the applicable standard of care* as plaintiff's workers' compensation attorneys.

¶ 16 "A defendant breaches her duty when she deviates from the applicable standard of care." *Rice v. White*, 374 Ill. App. 3d 870, 886 (2007). "[T]he standard of care against which the attorney's conduct will be measured must generally be established through expert testimony" (*Shanley v. Barnett*, 168 Ill. App. 3d 799, 803 (1988)), unless the "professional negligence is so grossly apparent that a layman would have no difficulty in appraising it as where the record discloses such an obvious, explicit, and undisputed breach of duty" (*Fence Rail Development Corp. v. Nelson & Associates, Ltd.*, 174 Ill. App. 3d 94, 98 (1988)). *Keef* stands for the general proposition that in exercising her duty to exercise a reasonable degree of care and skill in representing her client, an attorney may be required to go beyond the matter for which she was retained. *Keef* decided that issue as a matter of law; however, whether an attorney has exercised a reasonable degree of care and skill is a question of fact and the standard of care generally must

be established through expert testimony. See generally *Howard v. Druckemiller*, 238 Ill. App. 3d 937, 943 (1992).

¶ 17 Because the matters raised by the certified questions are dependent on resolution of fact questions, we now vacate our order of November 20, 2015 allowing this interlocutory appeal.

¶ 18 CONCLUSION

¶ 19 The order granting the petition for leave to appeal is vacated. The petition is denied and the appeal is dismissed; the cause is remanded to the trial court.

¶ 20 Petition denied; appeal dismissed; remanded.