2018 IL App (1st) 172304-U

FIRST DIVISION
November 13, 2018

No. 1-17-2304

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BOARD OF MANAGERS OF ELEVENTH STREET LOFTOMINIUM ASSOCIATION,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	
MCDONALD HOPKINS, LLC, NYHAN, BAMBRICK, KINZIE & LOWRY, P.C., and JOHN P. JACOBY,	)	No. 15 L 4997
Defendants,	)	Honorable Margaret A. Brennan,
(McDonald Hopkins, LLC, Defendant-Appellee).	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment in favor of defendant law firm in legal malpractice suit is reversed, where the circuit court was bound, pursuant to the law-of-the-case doctrine, by this court's earlier decision on a certified question holding that the client's hiring of a new law firm was not a superseding cause cutting off liability for defendant's negligence.

¶ 2 This case returns to us to review a summary judgment ruling that followed our answer to

a certified question under Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). Following the denial of its motion to dismiss, defendant law firm McDonald Hopkins, LLC (McDonald) asked this court in *Board of Managers of Eleventh Street Loftominium Association v. McDonald Hopkins, LLC*, 2014 IL App (1st) 133912-U (*Eleventh Street I*), to decide as a matter of law whether the hiring of a new law firm is a superseding cause cutting off any negligence on the part of a client's previous law firm for allowing the client's case to be dismissed for want of prosecution (DWP). *Id.* ¶ 2. We answered in the negative, holding that, in the absence of its formal withdrawal from the case, a law firm's negligence for failure to prevent or discover the DWP of a client's underlying claim is not superseded when the client terminates the firm and hires successor counsel. *Id.* ¶¶ 26, 28.

¶ 3 McDonald then successfully moved for summary judgment in the trial court. The plaintiff in the case—McDonald's former client, the Board of Managers of Eleventh Street Loftominium Association (Association)—argues on appeal that the trial court's grant of summary judgment for McDonald conflicts with our answer in *Eleventh Street I* and is thus precluded by the law-of-the-case doctrine. We agree and reverse and remand for further proceedings.

¶ 4 I. BACKGOUND

¶ 5 The factual background of this case at the time of our decision in *Eleventh Street I* is detailed in that order. *Id.* ¶¶ 4-11. We summarize it again here to provide context for the summary judgment proceedings that followed.

¶ 6 A. The Wabash Litigation

¶ 7 The Association filed suit against real estate developer Wabash Loftominium L.L.C. (the Wabash litigation), among others, on April 26, 2004, seeking recovery for alleged defects in the construction of its condominium building. The Association changed counsel and ultimately

retained McDonald through a written agreement entered into on March 19, 2008. On April 2, 2008, McDonald appeared on behalf of the Association in the Wabash litigation, through its employee John Jacoby.

¶ 8 There was a case management conference on January 25, 2010, but neither Mr. Jacoby nor anyone else from McDonald appeared. The conference was reset for February 22, 2010, but again no one from McDonald appeared, and the trial court dismissed the suit for want of prosecution.

¶ 9 Mr. Jacoby left McDonald in October 2010 to join Nyhan, Bambrick, Kinzie & Lowry, P.C. (Nyhan) and the Association entered into a written agreement with Nyhan to represent it in the Wabash litigation. In a letter dated October 22, 2010, the Association's property manager, Phoenix Rising Management Group, Ltd. (Phoenix) requested that McDonald transfer the Association's file to Nyhan. In that letter, the Association (through Phoenix) also "terminate[d] the prior retention agreement between [the Association] and [McDonald] for this date."

¶ 10 It is undisputed that as of October 22, 2010, counsel for the Association still had four months within which to file a new suit pursuant to section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2010) (allowing for "commence[ment of a] new action within one year" of dismissal for want of prosecution). However, no suit was ever filed and so the DWP foreclosed the Association from obtaining any relief against Wabash. The Association did not learn of the DWP until sometime in December 2011 or January 2012.

¶ 11 B. Procedural History before *Eleventh Street I*

¶ 12 The Association filed this legal malpractice case against McDonald, Nyhan, and Mr. Jacoby, on December 28, 2012. The Association argued that McDonald "owed [the Association] a duty of due care to act as reasonably careful attorneys with respect to the [Wabash] Litigation

arising out of their attorney-client relationship," and that McDonald breached this duty by, among other things: failing to appear at case management conferences; failing to diligently prosecute the litigation and prevent the DWP; failing to keep apprised of the status of the litigation, learn of the DWP, and timely seek reinstatement of the case; and failing to properly effect the transfer of representation from McDonald to Nyhan through a motion to substitute appearances of counsel or a motion for leave to withdraw as counsel. Had McDonald done any of these, the Association alleged, McDonald would have learned of the DWP of February 22, 2010, and "informed [the Association] of that fact, in which event [the Association] would have been able to file a petition for reinstatement of the litigation within the one-year period following the dismissal."

¶ 13 On March 7, 2013, McDonald moved to dismiss the complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)). McDonald argued the Association could plead no set of facts to show that its inaction was the proximate cause of the Association's injuries, given that "the underlying case was still viable at the time of the termination of the attorney-client relationship" between McDonald and the Board. The trial court, Judge John P. Kirby presiding, denied McDonald's motion on June 27, 2013, and denied reconsideration on September 17, 2013. The trial court reasoned that McDonald's failure to withdraw from the case meant it remained the Association's attorney of record even after its discharge and, therefore, it could be liable.

¶ 14 At McDonald's request, on November 27, 2013, the trial court granted McDonald's motion under Rule 308(a) to certify the following question for interlocutory review:

> "Whether a legal malpractice claim against a plaintiff's attorney for failure to seek reinstatement of a cause of action dismissed for want to prosecution is superseded and

> extinguished by plaintiff's termination of counsel and retention of successor counsel during the one-year period when reinstatement of the lawsuit is permitted—and thus, while the action is still viable—irrespective of whether prior counsel formally withdraws its appearance before the trial court."

¶ 15 On September 11, 2014, after full briefing, we answered in the negative and affirmed the denial of McDonald's section 2-619 motion in *Eleventh Street I*. We first considered the elements of a claim for legal malpractice: duty, breach, causation, and damages. *Eleventh Street I*, 2014 IL App (1st) 133912-U, ¶ 14. We then distinguished cause-in-fact from legal cause, noting that cause-in-fact arises either through the traditional "but for" test or the more modern "substantial factor" test, whereas legal cause rests on a "foreseeability" inquiry. *Id.* ¶¶ 15-16.

¶ 16 Applying these principles, we held that McDonald's argument—that any nexus between McDonald's own negligence and the injury to the Association was severed when the Association fired McDonald and hired Nyhan, even though McDonald never withdrew as counsel—was "contradicted by the Illinois Rules of Professional Conduct [IRPC] ***, Illinois Supreme Court Rules, and the Restatement (Third) of the Law Governing Lawyers." ¶¶ 21-22. We noted that although the IRPC "do not give rise to a separate cause of action, they do set forth the standard of care against which an attorney's duty of care is measured for purposes of a malpractice claim [citations]," and that the IRPC, Supreme Court Rules, and Restatement "all require that upon termination of the attorney-client relationship, the attorney formally withdraw from a case as counsel of record." *Id.* ¶ 22. Having failed to do so, "McDonald did not cease to be attorney of record at the time it was discharged by its client" and, accordingly, "any negligence on its part *** was not superseded by [the Association's] letter terminating the client-attorney relationship and its retention of Nyhan as the successor attorney." *Id.* ¶ 26.

¶ 17 C. Procedural History since *Eleventh Street I*

¶ 18 Again before the trial court, McDonald answered the complaint and the parties engaged in motion practice and discovery. McDonald then moved for summary judgment on July 21, 2017. It argued: (1) it owed no duty to the Association after its termination because it had no authority to act on the Association's behalf; (2) the Association could not show McDonald proximately caused its injuries because the Association still had four months to file the underlying lawsuit at the point it terminated McDonald (reiterating the "viability" argument it made in its prior appeal); and (3) our decision in *Eleventh Street I* did not preclude summary judgment, both because our answer addressed a different issue than the one it raised on summary judgment and, anyway, our decision did not qualify as law-of-the-case because it was "palpably erroneous."

¶ 19 McDonald attached to its summary judgment motion excerpts from the depositions of David Dye (president of the Association's board), Michael Kennelly (an officer with the Association's property manager, Phoenix, who sent the October 2010 termination letter to McDonald), as well as Michael Kim and Michael Downey (legal advisors to the Association), among other exhibits. We address the substance of these exhibits below, where applicable.

¶ 20 Following briefing and argument, the trial court, who was at that point Judge Margaret A. Brennan, granted summary judgment in McDonald's favor. The trial court found:

> "It is not even a question for me of disagreeing with what Judge Kirby did, or even going outside of what the Appellate Court did. The difference here is that we're now at summary judgment stance, and the standards applying here is what evidence are you going to bring that McDonald Hopkins was not in fact terminated by the board of managers in this respect. What evidence do you have to bring forth that the successor

counsel was not in place and already here. The case law is there about successor counsel. And for those reasons summary judgment is granted in favor of McDonald Hopkins."

¶ 21 In its handwritten order entered that same day, the trial court noted the summary judgment ruling; entered a settlement agreement between the Association, Nyhan, and Mr. Jacoby; dismissed the parties' various counterclaims; and entered the voluntary dismissal of Nyhan and Mr. Jacoby as a defendants. The Association appealed.

¶ 22 II. JURISDICTION

¶ 23 The Association timely filed its notice of appeal on September 18, 2017, challenging the trial court's summary judgment order of September 12, 2017. We have jurisdiction under Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 24 III. ANALYSIS

¶ 25 Summary judgment is appropriate if the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004); 735 ILCS 5/2-1005(c) (West 2016). A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). Although it is "an expeditious method of disposing of a lawsuit," summary judgment is "a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt." *Id.* Our review of a grant of summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)).

¶ 26 On appeal, the Association argues the trial court's summary judgment ruling contradicts our holding in *Eleventh Street I*, which it argues is law-of-the-case. "Under the law-of-the-case doctrine, generally, a rule established as controlling in a particular case will continue to be the law of the case, as long as the facts remain the same." *People v. Patterson*, 154 Ill. 2d 414, 468 (1992). "The doctrine applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication." *American Service Insurance Co. v. China Ocean Shipping Company Inc.*, 2014 IL App (1st) 121895, ¶ 17. "A decision on appeal becomes the law of the case on remand to the trial court and on a subsequent appeal on those issues which were raised and decided on the initial appeal." *Martin v. Federal Life Insurance Co.*, 164 Ill. App. 3d 820, 824 (1987).

¶ 27 Two exceptions allow for departure from the doctrine: (1) "when a higher reviewing court, subsequent to the lower reviewing court's decision, makes a contrary ruling on the same issue" or (2) "if the court finds that its prior decision was palpably erroneous." *Id.* The parties agree that, because no higher court has addressed the issues implicated by our answer to the certified question in *Eleventh Street I*, only the second of these exceptions is relevant.

¶ 28 We agree with the Association that the trial court erred in disregarding our earlier ruling, which is law-of-the-case. The trial court held that "[t]he difference here is that we're now at summary judgment stance, and the standards applying here is what evidence are you going to bring that McDonald Hopkins was not in fact terminated" and "that successor counsel was not in place and already here." The court's reasoning appears to be that McDonald's motion for summary judgment shifted the burden to the Association to come forward with evidence that McDonald still owed duties to it and, absent such evidence, McDonald's liability ended at its termination and the retention of Nyhan. This directly contradicts our prior holding:

> "A legal malpractice action against a client's attorney for failure to seek reinstatement of a cause of action dismissed for want to prosecution *is not superseded* and extinguished by plaintiff's termination of counsel and retention of successor counsel, while the action is still viable, *where prior counsel fails to properly and formally withdraw its appearance* before the trial court." (Emphasis added.) *Eleventh Street I*, 2014 IL App (1st) 133912, ¶ 1.

¶ 29 In other words, even if McDonald was terminated and Nyhan retained exactly as McDonald alleged in its summary judgment motion (which is undisputed), the firm's failure to withdraw as counsel meant it remained attorney of record and could potentially be liable for its failure to prevent, discover, and remedy the DWP of the Wabash case. This was our holding in *Eleventh Street I*, and it remains our holding today under the law-of-the case doctrine. The trial court's grant of summary judgment in McDonald's favor was inconsistent with that holding and therefore erroneous.

¶ 30 McDonald insists, however, that the law-of-the-case doctrine does not control here because (1) the first appeal was an interlocutory review under Rule 308, (2) the underlying facts and pleading posture have since changed, and (3) our answer in *Eleventh Street I* was "palpably erroneous" because we used the wrong test to determine the cause-in-fact of the Association's injury. McDonald separately argues that, under the correct test, it was not the "but for" cause of any injuries because the claim against Wabash remained "viable" when McDonald was discharged, and that by releasing Mr. Jacoby through its settlement, the Association also released McDonald. None of these arguments are persuasive.

¶ 31 First, McDonald claims, citing *Patterson*, 154 Ill. 2d 414, that the law-of-the-case doctrine requires a final judgment, and therefore does not apply to questions decided in Rule 308

interlocutory appeals. We rejected this same argument in *Rommel v. Illinois State Toll Highway Authority*, 2013 IL App (2d) 120273, explaining that "by permitting a Rule 308 appeal and answering the certified questions," an appellate court does indeed "render[ ] a final judgment," and that such an application of the law-of-the-case doctrine was "hardly novel." *Id.* ¶ 16.

¶ 32 We also reject McDonald's argument that factual differences that developed as a result of discovery conducted on remand preclude applying the doctrine. All McDonald offers in this regard is the deposition testimony of the Association's two legal experts (Mr. Kim and Mr. Downey) and the president of the Association's board (Mr. Dye), each of whom acknowledged that McDonald had no authority to represent the Association after it was discharged. However, that is no help to McDonald because, as we held in the first appeal, "McDonald did not cease to be attorney of record at the time it was discharged by its client, since it failed to properly file a motion to withdraw." *Eleventh Street I*, 2014 IL App (1st) 133912-U, ¶ 26. McDonald owed a duty to the Association to withdraw as attorney of record even after it was terminated and no longer authorized to represent the Association. McDonald has not identified anything in the record to suggest the factual basis for our holding in *Eleventh Street I* shifted during the course of discovery to render our earlier answer inapplicable.

¶ 33 McDonald claims that "the issues were different between the first and second appeals," merely because "[a] motion to dismiss challenges the sufficiency of the allegations" while "[a] motion for summary judgment questions whether the evidence presents a genuine issue of material fact." But, as this case illustrates, that is not necessarily true. We assumed at the motion to dismiss stage that McDonald had been discharged by the Board and on summary judgment that was proven to be so. We were aware at the motion to dismiss stage that McDonald did not file a motion to withdraw and that was confirmed on summary judgment. The relevant facts

simply did not change.

¶ 34 McDonald also argues against application of the law-of-the-case doctrine on the basis that this court's prior holding was "palpably erroneous." This exception "applies only in the very rarest of situations" and "only when a court's prior decision was obviously or plainly wrong" and "would work a manifest injustice." *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 12 (citing *Norris v. National Union Fire Insurance Company of Pittsburgh, PA*, 368 Ill. App. 3d 576, 583 (2006)).

¶ 35 Citing to *Harris v. Wunsch (In re Estate of Powell)*, 2014 IL 115997, McDonald argues our reliance in *Eleventh Street I* on the "substantial factor" test to determine the cause-in-fact portion of proximate cause was palpable error because, "in legal malpractice cases *** [our supreme court] requires use of the 'but for' test." We disagree with McDonald's reading of *Harris* and we believe that our reliance in *Eleventh Street I* on the "substantial factor" test was correct.

¶ 36 The court in *Harris* reviewed the dismissal of a legal malpractice complaint on behalf of a disabled ward for failure to protect that person's share of settlement proceeds. *Id.* ¶ 1. Turning to whether the complaint sufficiently alleged proximate cause, the court noted that "the plaintiff must plead sufficient facts to establish that 'but for' the negligence of the attorney, the plaintiff would not have suffered actual damages." *Id.* ¶ 24. With this bare reference, McDonald insists that "*Harris* provides the controlling rule of law" and that the court "did not permit the 'substantial factor' test to be substituted for the 'but for' test." However, *Harris* does not even mention, much less disavow, use of the "substantial factor" test. Nor do *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218 (2006), *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195 (2006), and *Northern Illinois Emergency Physicians v. Landau, Omahana &*

Kopka, Ltd., 216 Ill. 2d 294 (2005), the other cases McDonald relies on for the same proposition. None of these cases explicitly rejected use of the "substantial factor" test to determine whether a defendant law firm's negligence was the proximate cause of a plaintiff's injury. They simply applied the traditional "but for" analysis to situations that did not involve multiple potential causes.

¶ 37 Where—as in this case—the negligence of multiple parties has potentially caused a plaintiff's injury, the "substantial factor" test is entirely appropriate to analyze proximate cause. See *e.g. Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 979 (2005) (quoting *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258-59 (1999)) (analyzing proximate cause in a legal malpractice suit and noting that the relevant question is " '[w]as the defendant's negligence a material and substantial element in bringing about the injury' "); see also *Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395 (2004) ("[W]hen, as here, there are multiple factors that may have combined to cause the injury, we ask whether defendant's conduct was a material element and a substantial factor in bringing about the injury."). In sum, none of McDonald's arguments against application of the law-of-the-case doctrine in this case are persuasive.

¶ 38 Following from its insistence that the Board was required to show "but for" causation, McDonald relies on *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618 (2002), *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (2004), and *Huang v. Brenson*, 2014 IL App (1st) 123231, for the proposition that the "viability rule" relieves it of liability for negligently failing to prevent or correct the DWP. It insists that it could not have been the "but for" cause of the Association's injury because, when the Association terminated McDonald, there were still four months to re-file or reinstate the Wabash litigation after the dismissal. McDonald raised this same argument before us in *Eleventh Street I*, and cited these same cases. We found them

inapposite because, although they stand for the proposition that a prior attorney can be absolved of negligence by a successor attorney if the case remains viable at the time the successor attorney is retained, "none of these cases deal with the specific issue of whether the original attorney, liable for permitting a case to be dismissed for want of prosecution, properly withdrew as attorney of record" and "none of these cases create a bright line rule stating that the original attorney can never be the legal cause of the client's injury if the case remains viable." *Eleventh Street I*, 2014 IL App (1st) 133912-U, ¶ 27.

¶ 39 McDonald's final argument is that, on the day the trial court granted summary judgment, the Association "released Jacoby and Nyhan from all liability for their conduct while Jacoby worked at Nyhan," and "by releasing Jacoby the [Association] also released McDonald." It insists that "[a] settlement between a plaintiff and a principal's agent extinguishes the vicarious liability of the principal even if plaintiff reserved its rights against it," citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 528-29 (1993). The Association responds that the record "contains no release of any Defendants," rather, it shows a voluntary dismissal of Mr. Jacoby and Nyhan pursuant to a settlement and McDonald nonetheless remains "vicariously liable for the acts and omissions of its employee, Jacoby, that were within the scope of his employment for it."

¶ 40 We agree with the Association. McDonald acknowledges that any release of Mr. Jacoby was for his employment "at Nyhan." The complaint and the record thus far reveal allegations of negligence against McDonald predating Mr. Jacoby's time at Nyhan, including allowing the DWP of the Wabash case, failing to discover it, and failing to have the case reinstated or re-filed. The record contains no release of liability for this conduct. Instead, the Association has consistently sought to hold McDonald to account for its role in the dismissal of the Wabash litigation.

¶ 41 McDonald has not identified a basis—under the law-of-the-case doctrine or otherwise—for departing from our holding in *Eleventh Street I* to award it summary judgment. Whether McDonald's negligence was actually the proximate cause of any injury to the Association will depend, among other things, on the likelihood of success of the underlying claim against Wabash, which is an issue for the jury. We therefore reverse the grant of summary judgment for McDonald and remand the cause for further proceedings.

¶ 42 IV. CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the trial court is reversed and remanded for further proceedings consistent with this order.

¶ 44 Reversed and remanded.