2014 IL App (1st) 13-3912

FOURTH DIVISION
September 11, 2014

No. 1-13-3912

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE BOARD OF MANAGERS OF ELEVENTH STREET LOFTOMINIUM ASSOCIATION, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division.
v.	)	
McDONALD HOPKINS, LLC, Defendant-Appellant,	)	No. 12 L 014598
and	)	The Honorable John P. Kirby, Judge Presiding.
NYHAN, BAMBRICK, KINZIE & LOWRY, P.C., and JOHN P. JACOBY, Defendants.	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: 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a client's attorney for failure to seek reinstatement of a cause of action dismissed for want to prosecution is not superseded and extinguished by plaintiff's termination of counsel and retention of successor counsel, while the action is still viable, where prior counsel fails to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.

¶ 2 This cause of action arises from a legal malpractice action filed by the plaintiff-appellee, the

Board of Managers of the Eleventh Street Loftominium Association (hereinafter the condo association) against the defendants: (1) two law firms, McDonald Hopkins LLC (hereinafter McDonald), and Nyhan, Bambrick Kinzie, & Lowry, P.C. (hereinafter Nyhan); and (2) an attorney who worked for both law firms, John P. Jacoby (hereinafter Jacoby). This appeal concerns only the condo association and the defendant McDonald, who appeals from the circuit court's denial of its motion to dismiss. In this appeal, we are only asked to answer the following question, which was certified, upon McDonald's motion, by the circuit court for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010):

> "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a plaintiff's attorney for failure to seek reinstatement of a cause of action dismissed for want to prosecution is superseded and extinguished by plaintiff's termination of counsel and retention of successor counsel during the one-year period when reinstatement of the lawsuit is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."

For the reasons that follow, we answer that question in the negative and affirm the circuit court's judgment.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following undisputed facts and procedural history. April 26, 2004, the condo association filed a contract action against, *inter alia*, the developer, Wabash Loftominium L.L.C. (hereinafter Wabash), because of alleged defects in the construction of the condominium building. At this stage, the condo association was represented by counsel, Michael

Best & Friedrich, L.L.P (hereinafter Michael Best).[1] After the specific attorney who represented the condo association moved from Michael Best, to a new law firm, Arnstein & Lehr, L.L.P. (hereinafter Arnstein & Lehr), in December 2005, the circuit court disqualified Arnstein & Lehr as the condo association's counsel. In August 2007, this appellate court affirmed that decision. See *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185 (2007), *leave to appeal den'd*, 226 Ill. 2d 580 (2007). The court issued its mandate in January 2008, and the case was assigned a new case number on November 19, 2009.

¶ 5 On March 19, 2008, the condo association entered into a written agreement with a new law firm, the defendant in this cause of action, McDonald, to represent it in that lawsuit. At that time, the defendant Jacoby was employed as an attorney at McDonald. On April 2, 2008, McDonald filed a substitute appearance for the condo association, and Jacoby, the condo association's primary attorney, signed the appearance.

¶ 6 The case was scheduled for a case management conference on January 25, 2010. Neither Jacoby nor any other attorney from McDonald appeared on behalf of the condo association. Accordingly, the trial court reset the case management conference for February 22, 2010. When neither Jacoby nor any other attorney from McDonald appeared in court to represent the condo association on that date, the circuit court dismissed the lawsuit for want of prosecution.

¶ 7 In October 2010, Jacoby left McDonald and joined the law firm of Nyhan. The condo association entered into a written agreement with Nyhan to represent the condo association in the lawsuit. Following Nyhan's retention, on October 22, 2010, the condo association's property

[1] The attorney representing the condo association from Michael Best & Friedrich then moved to Arnstein & Lehr, LLP.

manager, Phoenix Rising Management Group, Ltd., (hereinafter Phoenix) requested, by letter, that McDonald transfer the condo association's file to Nyhan. That letter specifically stated:

> "Please let this correspondence serve as our request for transfer of all of the files materials, both hard copy and electronic for the above client. These files should be transferred to the possession of John P. Jacoby, at the firm of Nyhan, Bambrick, Kinzie & Lowry. This transfer should include the general file as well as all of the other matters for the 11th Street Lofts Condominium Association."

As part of the same letter, the condo association also discharged McDonald as its attorney. As the letter stated:

> "Finally, please let this correspondence formally terminate the prior retention agreement between 11th Street Lofts Condominium Association and McDonald Hopkins for this date."

¶ 8 The parties agree that as of October 22, 2010, Nyhan and Jacoby had four months within which to file a new action on behalf of the association pursuant to section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 2010)). Nyhan and Jacoby, however, neither filed an appearance nor moved to substitute their appearance for that of McDonald in the lawsuit. As a result, the dismissal for want of prosecution remained unchallenged.

¶ 9 The condo association learned of the dismissal for the first time on January 2012. On December 28, 2012, the condo association filed a legal malpractice complaint against McDonald, Jacoby and Nyhan. With respect to McDonald, the condo association alleged that had Jacoby or anyone at McDonald investigated the status of the Walsh litigation at any time during 2010, they would have avoided the dismissal for want of prosecution altogether. In addition, the condo association alleged that after the case was dismissed for want of prosecution on February 22, 2010, Jacoby and McDonald again failed to investigate the status of the litigation and therefore

failed to learn of the dismissal. As a result, they did not inform the Board of the dismissal to permit it to file a petition for reinstatement of the litigation within the one-year statutorily permitted time-period. The condo association also alleged that although after its request for a transfer of its file from McDonald to Nyhan, McDonald transferred the file, it never sought to take any further steps to effect the transfer or litigation to Nyhan (such as, filing a motion for leave to withdraw its appearance on behalf the condo association or a motion to substitute Nyhan as the condo association's new attorney). According to the complaint, had McDonald done so, as it should have, it would have learned of the dismissal for want of prosecution and informed the condo association of that fact, in which event, the condo association would have been able to file a timely petition for reinstatement.

¶ 10 On March 7, 2012, McDonald filed a section 2-619(9) (735 ILCS 5/2-619(9) (West 2010)) motion to dismiss the condo association's complaint alleging that the condo association could not prove that McDonald was the proximate cause of any damages in the malpractice action, since the underlying case against Walsh was still viable at the time of the termination of the attorney-client relationship between McDonald and the condo association. McDonald alleged that because the underlying action was viable at the time of its discharge, Nyhan and Jacoby's failure to seek reinstatement of the suit was the superseding cause of the condo association's loss.

¶ 11 On June 27, 2013, the circuit court denied McDonald's motion to dismiss. McDonald filed a motion to reconsider, which the court denied on September 17, 2013. In doing so, the court ruled that because McDonald had failed to withdraw from the case, it remained the condo association's attorney of record even after its discharge, and as such could still be liable. McDonald then moved for a permissive interlocutory appeal pursuant to Illinois Supreme Court

Rule 308 (eff. Feb. 26, 2010). On November 27, 2013, the trial court granted that request and certified the following question for 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."

¶ 12 II. ANALYSIS

¶ 13 Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) provides the remedy of a permissive appeal from an interlocutory order, where the trial court has deemed that such an order involves "a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal from the order may materially advance the ultimate termination of the litigation." Our review of a legal question presented in an interlocutory appeal brought pursuant to Supreme Court Rule 308 is *de novo*. *American Family Mut. Ins. Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 29 (citing *Simmons v. Homatas*, 236 Ill. 2d 459, 466 (2010)). *De novo* consideration means we perform the same analysis that a trial judge would perform. *American Family Mut. Ins. Co.*, 2014 IL App (1st) 131631, ¶ 29 (citing *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)). In addition, we are limited to the issues raised in the certified question and will not go beyond that question to consider other matters. *American Family Mut. Ins. Co.*, 2014 IL App (1st) 131631, ¶ 29; see also *Townsend v. Sears, Roebuck & Co.*, 227 Ill.2d 147, 153 (2007) ("An interlocutory appeal pursuant to Supreme Court Rule 308 is ordinarily limited to the question certified by the circuit court ***.").

¶ 14 Turning to the certified question, we begin by laying the framework of a legal malpractice claim. "To state a cause of action for legal malpractice, the plaintiff must allege facts to establish (1) the defendant attorney owed the plaintiff client a duty of due care arising from an attorney-client relationship; (2) the attorney breached that duty; (3) the client suffered an injury in the form of actual damages; and (4) actual damages resulted as a proximate cause of the breach." *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122, ¶ 27 (quoting *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008)).

¶ 15 Proximate cause consists of two elements: cause-in-fact and legal cause. *Young v. Bryco Arms*, 213 Ill.2d 433, 446 (2004); *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the plaintiff's injury." *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010) (citing *Young*, 213 Ill. 2d at 466); see also *Lee*, 152 Ill. 2d at 455. Under the traditional "but for" test, a plaintiff must plead facts establishing that, but for the attorney's malpractice, the plaintiff would have prevailed in the underlying action. *Huang v. Brenson*, 2014 IL App (1st) 12321, ¶ 26 (citing *Estate of Powell v. John C. Wunsch, P.C.*, 213 IL App (1st) 121854, ¶ 29). Under the more modern, "substantial factor" test, the relevant question becomes "whether the defendant's conduct is a material element and a substantial factor in bringing about the injury." *Krywin*, 238 Ill. 2d at 226. Our supreme court has explained that under this test "[c]onduct is a material element and a substantial factor if, absent the conduct, the injury would not have occurred." *Krywin*, 238 Ill. 2d at 226; see also *Simmons v. Garces*,198 Ill. 2d 541, 558 (2002) ("Actual cause, or cause in fact, can be established only where 'there is a reasonable certainty that a defendant's acts caused the injury or damage.' [Citation.]"). In other words "[i]f the plaintiff's injury would not have occurred absent the defendant's conduct, then the conduct is a material element and substantial

factor in bringing the injury." *Garest v. Booth*, 2014 IL App (1st) 121845, ¶ 41 (citing *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). "Where reasonable minds could disagree on the outcome of the substantial factor test, it is for the jury to decide whether a defendant's conduct factored substantially in a plaintiff's injury." *Bell ex rel. Street v. Bakus*, 2014 IL App (1st) 131043, ¶23 (citing *Lee*, 152 Ill. 2d at 455)).

¶ 16 The second prong of proximate cause is legal cause, which is " 'essentially a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct. [Citation.]' " *Bell ex rel. Street v. Bakus*, 2014 IL App (1st) 131043, ¶23 (citing *Lee*, 152 Ill. 2d at 455). Our courts have repeatedly held that an injury will be found not to be within the scope of the defendant's duty if it appears "highly extraordinary" that the breach of the duty should have caused the particular injury. *Bell ex rel. Street v. Bakus*, 2014 IL App (1st) 131043, ¶23 (citing *Lee*, 152 Ill. 2d at 455). If a defendant's conduct does nothing other than furnish a condition by which the injury is made possible, and the condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *Garest*, 2014 IL App (1st) 121845, ¶ 41 (citing *Abrams*, 211 Ill. 2d at 259).

¶ 17 However, if there is more than one proximate cause of an injury, one guilty of negligence cannot avoid liability simply because another person was also guilty of negligence contributing to the same injury, even if the injury would not have occurred but for the latter person's negligence. *Leone v. City of Chicago*, 235 Ill. App. 3d 595, 603-04 (1992)); see also *Rivera v. Garcia*, 401 Ill. App. 3d 602, 610-11 (2010) ("where injury is caused by the concurrent negligence of two persons and the accident would not have occurred without the negligence of both, the negligence of each is a proximate cause of the injury"); see also *Garest*, 2014 IL App

(1st) 121845, ¶ 41 (proximate cause " 'need not be the only, last or nearest cause; it is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes injury.' (quoting *Leone*, 235 Ill. App. 3d at 603).")

¶ 18 To avoid liability, where there are successive negligent actors, the original negligent actor must establish that the negligence of the second actor was a superseding cause, so as to relieve the original negligent actor of liability, as a matter of law. *Huang*, 2014 IL App (1st) 123231, ¶ 28 (citing *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 979 (2005). Because a foreseeable intervening cause does not break the chain of legal causation, to avoid accountability, the original negligent actor must show that the intervening action/event (*i.e.*, the negligence of the second actor) was "*unforeseeable* as a matter of law." *Huang*, 2014 IL App (1st) 123231, ¶ 28.

¶ 19 Our courts have repeatedly held that proximate cause is an issue of fact to be decided by the jury. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 476 (2001). Although a court can rule as a matter of law that proof of proximate cause is inadequate, our supreme court has held that to do so requires that "the facts are undisputed and reasonable men could not differ as to the inferences to be drawn from those facts." *Harrison*, 197 Ill. 2d at 476. "Where varying inferences are possible, foreseeability is a question of fact for the jury." *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 79.

¶ 20 In the present case, we are asked to answer the following question in the context of a legal malpractice claim:

> "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."

¶ 21 McDonald argues that if we answer this question in the affirmative, the condo association cannot establish legal causation, and therefore any legal malpractice claim it has against McDonald must fail. McDonald contends that we should find, as a matter of law, that the condo association's letter terminating McDonald as its counsel and its retention of Nyhan as successor counsel during the one-year period when reinstatement of the lawsuit dismissed for want of prosecution was permitted, superseded and extinguished any negligent conduct by McDonald so as to absolve it of all liability, regardless of whether McDonald formally withdrew its appearance before the trial court as the condo association's counsel. McDonald claims that after it received the condo association's letter terminating its employment, it automatically ceased to be the condo association's attorney of record. It further argues that because, at this point, the condo association's case was still viable, and could have been reinstated by Nyhan or Jacoby (now working for Nyhan) any nexus between its own negligence and the injury to the condo association was severed. For the reasons that follow, we disagree.

¶ 22 Although our research has unveiled no precedent directly on point, we find that McDonald's position is contradicted by the Illinois Rules of Professional Conduct (hereinafter IRPC),[2] Illinois Supreme Court Rules, and the Restatement (Third) of the Law Governing Lawyers. While the IRPC do not give rise to a separate cause of action, they do set forth the

[2] We note that throughout this order we rely on the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct (2010) (eff.Jan.1, 2010)).

standard of care against which an attorney's duty of care is measured for purposes of a malpractice claim. See *e.g., First National Bank v. Lowrey*, 375 Ill. App. 3d 181, 197-98 (2007); *Skorek v. Przybylo*, 256 Ill. App. 3d 288, 291 (1993) ("the rules of legal ethics, while relevant to the standard of care in a legal malpractice suit, [citations], do not establish a separate duty or cause of action in tort."); *Nagy v. Beckley*, 218 Ill. App. 3d 875, 881 (1991) (same). The IRPC, the Illinois Supreme Court Rules and the Restatement (Third) of the Law Governing Lawyers, all require that upon termination of the attorney-client relationship, the attorney formally withdraw from a case as counsel of record.

¶ 23 Specifically, IRPC Rule 1.16 (Ill. R. Prof. Conduct (2010) R. 1.16 (eff. Jan.1, 2010)), discusses an attorney's duties to the client upon "declining or terminating" representation. Subsection (a) of that Rule states that an attorney will "withdraw" from the representation of a client if, among other things, "the lawyer is discharged" by the client. Ill. R. Prof. Conduct (2010) R. 1.16 (eff. Jan. 1, 2010). Subsection (c) of that Rule further provides that when the attorney withdraws, he or she "*must* comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." (Emphasis added). Ill. R. Prof. Conduct (2010) R. 1.16 (eff. Jan. 1, 2010). In addition, subsection (c) permits an attorney to remain the attorney of record even after formal discharge by a client stating that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Ill. R. Prof. Conduct (2010) R. 1.16 (eff. Jan. 1, 2010).

¶ 24 Likewise, Illinois Supreme Court Rule 13(c)(2) makes plain that "[a]n attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record." Ill. S. Ct. R. 13(c)(2) (eff. July 1, 1982). Supreme Court Rule 13(c)(2) further states that "unless another attorney is substituted, [the attorney of record] 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).

¶ 25 The Restatement (Third) of Law Governing Lawyers similarly requires formal withdrawal of representation whenever a client-attorney relationship is severed (be it by client discharge or attorney's desire to terminate). Section 31(2)(a) of that Restatement states: "Subject to Subsection (1) and Section (33), a lawyer's actual authority to represent a client ends *** when the client discharges the lawyer." Restatement (Third) of Law Governing Lawyers, § 32(2)(a) (2000)). Subsection (1) notes, however, that upon discharge and before actual authority to represent a client ends "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue." Restatement (Third) of Law Governing Lawyers, § 31(1) (2000). Similarly, subsection 32(1) of the Restatement (Third) of Law Governing Lawyers, states that "subject to Subsection (5), a client may discharge a lawyer at any time." Restatement (Third) of Law Governing Lawyers, § 32(1) (2000). However, Subsection (5) of that section mandates that upon discharge, the lawyer nevertheless must "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue." Restatement (Third) of Law Governing Lawyers, § 32(5) (2000).

¶ 26 Under the aforementioned principles, we conclude that in this case, 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 as attorney of record. Accordingly, any negligence on its part (among other things, its failure to check on the status of the case so as to discover the dismissal for want of prosecution, and its failure to advise its client of such a dismissal) was not superseded by the

condo association's letter terminating the client-attorney relationship and its retention of Nyhan as the successor attorney.

¶ 27 In coming to this decision, we have reviewed the cases of *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill.App.3d 618 (2002), *Cedeno v. Gumbiner*, 347 Ill.App.3d 169 (2004), and *Huang*, 2014 IL App (1st) 12321, cited to by McDonald and find them inapposite. Although we recognize that these cases stand for the proposition that a prior attorney can be absolved of negligence by a successor attorney so long as the client's case remains viable at the time successor counsel 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. What is more, 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. Rather they all ask for a fact-by-fact analysis, which considers, among other things, the actions taken by the original attorney and the successor attorney, the length of time the case remained viable, and the actual "viability" of the case.

¶ 28 Here, McDonald first negligently failed to appear on behalf of the condo association, thereby forcing the circuit court to dismiss the case for want of prosecution. McDonald then also failed to research the status of the case to determine that it was dismissed, even after Jacoby, who represented the condo association in the case on behalf of McDonald, left the firm and joined Nyhan. Under these facts, we cannot find as a matter of law that without a formal withdrawal, McDonald ceased to be attorney of record, so as to absolve it of any liability. *C.f., Firkus v. Firkus*, 200 Ill.App.3d 982, 990 (1990) (taking judicial notice of the fact that "a party may be represented by more than one attorney or more than one law firm at the same time.").

¶ 29 III. CONCLUSION

¶ 30 Accordingly, for all of the aforementioned reasons, we answer the certified question in the negative and affirm the judgment of the circuit court.

¶ 31 Affirmed.