ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1292

MORRIS K. HINTON APPELLANT	:	ON APPEAL FROM HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT
vs.	:	
GARY F. FRANKE, et.al., APPELLEES	:	COURT OF APPEAL NO.: C-1200353

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANT MORRIS K. HINTON JR.

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RECEIVED
JUL 30 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTERESTS AND INVOLVES A SUBSTABNTIAL CONSTITUTIONAL QUESTION

This case presents three critical issues that will adversely effect the future operation and use of how remedial statutes and rights will operate in the courts of Ohio: (1) Whether newly discovered evidence containing operative facts warrants relief under Civil Rule 60(B)(2); (2) Whether grounds for relief are supported by newly discovered evidence constitutes a meritorious defense under Civil Rule 60(B); (3) Whether newly discovered evidence presented pursuant Civil Rule 60(B)(2) constitutes a substitute for a direct appeal, when the evidence used dehors the trial court's record and is the grounds of the action warranting relief.

In this case, the court of appeals determined that newly discovered evidence, containing specific operative facts, presented to the trial court pursuant to Civil Rule 60(B)(2), dismissed without an evidentiary hearing, evidence not reviewable upon appeal, to be a substitute for a direct appeal. A decision that effectively altered the operation of that curative legislative rule. Furthermore, this decision prevents the remedial affects of newly discovered evidence upon unjust judgments, since now new evidence, once cognizable under Civil Rule 60(B)(2), is no longer cognizable before the courts of common pleas in Ohio.

The decision of the court of appeals threatens future litigants in the State of Ohio from effectively benefiting from post remedial legislation such as Civil Rule 60(B) and of Constitutional right - Sec. 16, Art. 1, Ohio Constitution – of direct appeal. Legislative intent for Civil Rule 60(B), specifically division (2), was to create a statutory means whereby litigants, prevented from presenting existing evidence prior to a judgment, evidence which would of proven the merits/facts of a matter differently, could thereby seek relief from the unjust operation of a judgment made without the benefits

thereof and have that judgment vacated. Evidence is not reviewable upon direct appeal since that evidence is deemed to be outside the trial court's record. The decision here unravels those potential benefits and will subject litigants to the continual affects of unjust judgments should this decision be allowed to stand as a precedence. It will also change the issues/actions that can be reviewed on direct appeal, allowing evidence originally not before the trial court, to now be presented and utilized on direct appeal. Thereby, eliminating forever any future actions under Civil Rule 60(B)(2) in the State of Ohio, or the need to present evidence to the trial court first. This decision of the court of appeals effectively reshapes the process for introducing newly discovered evidence and any prerequisites whereby it must be legally introduced first to the trial court in the future.

The decision of the court of appeals puts at odds 2 very distinct remedial actions. Civil Rule 60(B)(2) specifically allows this statutory redress of a judgment based on newly discovered evidence, not available prior to the adverse judgment, evidence that would cause a judgment to be viewed against the original opinion. A direct appeal on the other hand allows Constitutional redress of litigated issues and judgments, based solely upon the evidence already on the trial court's record; and therefore, does not afford the ability to present new evidence not already upon the trial court's record. These 2 very distinctive remedial actions – one statutory and one constitutional - operate from 2 separate perspectives are now clouded by this decision of the court appeals. Remedial avenues adversely altered, possibly barring any relief involving newly discovered evidence through their application, should this decision of the court of appeals is allowed to stand.

The implications of the decision of the court of appeals on the operations of these 2 distinct remedial actions - one statutory and one constitutional, will greatly hamper future actions where newly discovered evidence is at issue, not only under division (2), but also under division (5) when newly

discovered evidence is beyond the 1 year time frame. The decision will also change the "what" a meritorious defense or grounds warranting relief is pursuant to Civil Rule 60(B); and the "how" or "if" newly discovered evidence, addressing the merits of the underlying case, can ever again be presented post-judgment to affect a cure upon the effects of an unjust judgment entered without the benefits of the new evidence. Evidence that would change the outcome, warrants relief as a matter of law and judicial equity.

This case is one of great public interest, in that the decision has broad significance effecting not only remedial matters, but how newly discovered evidence can be presented before a court of common pleas in the future. It will forever alter how future litigants will be able to proceed and adversely effect those litigants' ability to have newly discovered evidence considered or be granted an evidentiary hearing where a case could be reviewed on all of its merits, permitting justice to be meted out fairly. This decision sets a precedent that will exclude relief pursuant to Civil R. 60(B)(2)&(5), as well diminish the usage of evidentiary hearings. According to this precedent the trial court will be divested of its cognizable ability to determine if any evidence – new or otherwise - would make a judgment unjust and voidable.

The long range prospective may even aversely effect the Federal Rules of Civil Procedure 60(B)(2) motions involving newly discovered evidence.

This precedence virtually removes any and all opportunities to present newly discovered evidence, since such evidence has never been reviewable upon direct appeal. A precedence that construes such would be a precedence that dismisses an appellant's appeal - of future Civil Rule 60(B)(2) or (5) motions - prior to the filing of their notice of appeal pursuant to App. R. 3 or 4. It effectively prevents any redress of matters and is constitutional unsound.

The conclusion of the court of appeals is contrary to the statutory scheme of Civil R. 60(B)(2). It also is contrary to the "how" and "what" evidence can be review upon direct appeal. It also opposes the specific authorities addressing "what" evidence is reviewable on appeal by the Supreme Court of Ohio, including the numerous Appellate Districts who have followed that holding, creating a conflict between Appellate District. Therefore, the judgment of the court of appeals has great general significance as it undermines legislative intent, court rules & procedures, Ohio Constitution, and authorities from the Ohio Supreme Court and other appellate courts in Ohio and thereby should be overturned.

This matter is of great interest because it not only involves legislative enactment and rights of Constitutional redress, it also deals with specific legislated duty set in place for the protection of others. When a person, namely an attorney, fails to observe those duties, especially knowingly, it constitutes negligence per se.

This matter involves a Constitution Question concerning the right of due process and property matters. When a client is denied his rights of due process because of negligence of an attorney – an attorney not chosen by the client - and such negligence causes the loss of the client's property, their rights within the framework of both the U.S. Constitution and the Constitution of the State of Ohio that are established to guard against such mishaps are clearly violated. Appellant does not pretend to be an attorney in this matter, he must rely on the sound discretion of this Court's veracity for justice. Appellant was without the ability to retain counsel and was forced by time restraints to file and proceed pro se and should not be held to the same standards as an attorney would be.

A portion of the Merits/Facts in the underlying case are: (1) the Appellees entered an appearance creating an unwanted and unknown attorney-client relationship, (2) they then filed an

answer without speaking to their client – a client's legal matter intruded upon by them - nor did they get his permission beforehand, (3) they denied/prevented vital legal documents to be responded to by their client, failing to alert him or warn him of the repercussions involved in failing to respond timely, (4) they neglected their client throughout and refused to correct the damage caused by their lack of attention to their client and his legal matter they were lawfully bound to represent in a competent fashion, and (5) this led to the damages and loss sustained by their client.

The case progressed for a total of 39 months – August 2005 through the granting of the demolition order and the demolition of Plaintiff's 4 homes in November 2008 - and for roughly 36 of those months there was absolutely no communicate between the so-called competent Appellees and their client. They choose to neglect their client and his legal matter, the underlying merits/facts of this case, admitted to by the Appellees and confirmed as true by the Office of Disciplinary Counsel, constitutes negligence and malpractice.

To contemplate this negligence as professional care/conduct of a client/their legal matter to be within any boundary of preconceive proper professional standard of care is preposterous. For any court to turn their backs on a victim of such negligence is an abuse of discretion and would create the appearance of collusion between officers of the court. It also denies the victim from the protection they are entitled to under the Ohio Rules of Professional Conduct, the law, and their ability to receive justice within our court system – trial court and appellate - making the decision by the court of appeals to clearly be arbitrarily made as well.

The Merits/Facts of neglect are admitted to by the Appellees, they failed to communicate with their client from September 2005 through August 2008. Negligence admitted to which undoubtedly was the causation of the damages sustained is without question, and established as this Court held in

Vahila v. Hall, 77 Ohio St. 3d. 421, 427-428:

"Accordingly, we hold that to establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. We are aware that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case. Naturally, a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim. See Note at 671; and Krahn, 43 Ohio St. 3d at 106, 538 N.E.2d at 1062. However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim."

STATEMENT OF THE CASE AND FACTS

This case arises from the gross negligence of the Attorney Gary F. Franke and Gary F. Franke Co. L.PA. (Defendants in Case No. : A-1000931) in a property ordinance complaint filed against Morris K. Hinton (Defendant in Case No. : A-05006641) by the City of Springdale. Frankes entered an appearance as counsel for Hinton and filed an answer in Case No.: 05006641, doing both without Hinton's knowledge or permission. Hinton was the only named defendant in that case. Frankes claimed that a third party requested their involvement. The error in their judgment here, which facilitated the negligence, was Frankes' failure to verify the third party's scope of lawful abilities concerning Hinton. This failure to verify, coupled with the third party's limited lawful authorization and the fact that her Limited P.O.A. had terminated at that time upon her own decision, effectively excluded Hinton from the processes of his own legal matter and the attorney/firm claiming to represent him and his property interests. Again all events are without Hinton's knowledge, outside the complaint itself, which had already been addressed by Attorney Hoefle in August 2005.

Case No.: A-05006641 began in August 2005 and ended with the razing of the 4 homes in

November 2008, basically 39 months give or take a week. Hinton only became aware of Frankes in August-September 2008, 36-37 months after the fact, after the default judgment that ultimately resulted in the damages sustained.

Hinton filed a grievance with the Cincinnati Bar Association in 2009 raising various issues with Frankes' representation, including a failure to communicate. They determined that there were no ethical violations, nor was an investigation held.

Hinton filed a complaint against Frankes on February 1, 2010 for his refusal to intervene in preventing the destruction of his 4 homes, or remedying his client's loss due to their irrefutable negligence in the matter. Clearly, intervention, plus a defense were available in the matter, it would of entailed Frankes' admittance of their negligence in the matter to the Court. They could of filed an appeal and a stay of the demolition order, admitting again their lack of due diligence and negligence in the case, with none of it being imputed to Hinton, since he did not choose to be represented by them, nor was he aware of their involvement until after the fact.

Hinton filed a second grievance with the Cincinnati Bar Association in 2010 raising the same issues with Frankes' representation. Again, there was no ethical violations determined, nor was there an investigation. Basically a carbon copy.

Hinton sent a Notice of Voluntary Dismissal on March 21, 2011. That notion has never been seen of since – allegedly never arriving at the clerk of court's office and never being returned by the post office since. Even the service of process copy sent to Frankes' attorney vanished without a trace as well - supposedly.

Hinton's complaint was dismissed on April 4, 2011, when the trial court granted Frankes' motion for summary judgment for lack of expert testimony in order to establish the malpractice claims asserted.

Hinton requested legal assistance/expert testimony by sending numerous letters to attorneys in Ohio and beyond without success. An attorney/prosecutor from Ross Co. forwarded one of Hinton's requests to the Office of Disciplinary Counsel for the Supreme Court of Ohio in June of 2011. The O.D.C. conducted an investigation and through such, the facts were finally documented being admitted to by Frankes, concluding that Frankes had violated Prof. Con. R. 1.4 – Failure to communicate directly with his client from September 2005 through August 2008.

Hinton, upon receiving the long sought after confirmation of the facts concerning Frankes' negligence (i.e. newly discovered evidence - the admission from Frankes' failure to communicate with his client) filed a Civil R. 60(B)(2) motion seeking relief from the April 4, 2011 judgment dismissing Hinton's complaint for want of expert testimony to establish the facts now admitted to.

On April 19, 2012, the trial court dismissed Hinton's Civil R. 60(B)(2) motion for want of an expert testimony, claiming the determination letter only stated that the grievance against Frankes was dismissed and no disciplinary action was taken, therefore amounted to nothing new in support of Hinton's claims against Frankes.

On May 15, 2011, Hinton's filed a timely Notice of Appeal.

On June 26, 2012 Hinton's appeal was dismissed, granting Franke's motion to dismiss appeal claiming that the filing of a Civil R. 60(B)(2) motion was a substitute for a direct appeal.

As stated in the "Explanation Of Why This Case Is A Case Of Public Or Great General Interests" the evidence going to the merits/facts of the underlying claim of malpractice were finally admitted to by the Appellees and then documented, an admission that continues to be denied its credibility or day in court establishing the action for legal malpractice, based on the negligent representation of Appellees in that case.

In support of its position on these issues, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1:

New evidence falls within Civil Rule 60(B)(2), which relates to "newly discovered evidence," containing sufficient operative facts of the underlying case warranting relief of judgment.

When a meritorious defense under Ohio Civil Rule 60(B)(2), a defense going to the substance/merit of the case, one being substantiated with evidence as being true, warrants relief outright as a matter of law, and a failure to grant such relief constitutes an abuse of discretion by the court. The matter is further exacerbated when a reviewing court dismisses an appeal, creating precedents that are misleading and tend to contradict established authorities set by the Supreme Court of Ohio. Kay v. Marc Glassman, Inc., (1996) 76 Ohio St. 3d. 18, 19. Also see Keaton v. Purchase Plus Buyers Group, 145 Ohio App. 3d 796 that specify a hearing is mandated when "grounds for relief are "sufficiently alleged" and are supported with evidence which would warrant relief from judgment".

Furthermore, the court of appeals here already understands that Civ. R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served. Colley v. Bazell (1980), 64 Ohio St. 2d 243, 249, 18 Ohio Op. 3d 442, 446, 416 N.E.2d 605, 610. A remedial rule entitled to liberal construction with a view toward a just result. Motorists Mut. Ins. Co. v. Five Star Commer. Roofing, 2010 Ohio Misc. LEXIS 488.

Instead the decision of the court of appeals frustrates a litigant's ability to pursue effective statutory means of relief through Civil Rule 60(B)(2) actions. Marion Production Credit Asso. v. Cochran, 40 Ohio St. 3d 265, "Courts must also remain mindful of the admonition that cases should be

decided upon their merits, where possible, rather than on procedural grounds." Griffey v.. Rajan, 33 Ohio St. 3d 75. A liberal construction or being construed liberally is an important factor necessary to ensure justice is meted out to all parties, even after a final judgment has been entered, especially concerning pro se litigants. Morgan v. Dye, 1998 Ohio App. LEXIS 5945, State ex rel. Karmasu v. Tate, 83 Ohio App. 3d 199, See: Beaudett v. Hampton (C.A.4, 1985), 775 F.2d 1274, 1277.

Instead of liberally construing a remedial statutory rule legislated for the sole purpose of introducing newly discovered evidence to the trial court, it is instead renders useless by the decision of the court of appeals. The court of appeals here has determined that a Civil Rule 60(B)(2) motions are a substitute for a direct appeal. That decision effectively banishes the only avenue to introduce newly discovered evidence seeking relief, other than moving for a new trial under Civil Rule 59(B). Unless the court of appeals is advocating and setting a new precedent in which newly discovered evidence - evidence not upon the trial court's record - can be utilized on direct appeal, whereby issues and errors from the trial court level may be addressed and argued with, then the decision of the court of appeals is in error, arbitrarily made, and should be overturned.

Proposition of Law No. 2:

Grounds warranting relief are supported by newly discovered evidence constitutes a meritorious defense under Civil Rule 60(B)(2).

A meritorious defense is one that under Ohio Civil Rule 60(B)(2), is a defense going to the substance/merit of a case, especially by evidence as being true, warrants relief outright as a matter of law.

"A meritorious defense under Civ. R. 60(B). "A 'meritorious defense' means a defense 'going to the merits, substance, or essentials of the case.'" Wayne Mut. Ins. Co. v. Marlow (June 5, 1998),

Montgomery App. No. 16882, 1998 Ohio App. LEXIS 2378, citing Black's Law Dictionary, abridged, (6 Ed. Rev.1991) 290. UBS Real Estate Securities v. Teague (2010) 191 Ohio App. 3d 189.

Accordingly, any doubt, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. GTE Automatic Elec, Inc., at paragraph three of the syllabus. Daimler Chrysler Fin. v. LNH, Inc., 2012 Ohio 2204 and Doddridge v. Fitzpatrick, (1978) 53 Ohio St. 2d 9.

Newly discovered evidence that goes to the heart of a case, that being the merits of the underlying issues themselves, warrants relief of judgment so the case can be decided utilizing all the facts relevant, especially when that newly discovered evidence contradicts the unjust judgment.

The definition of meritorious and merit are synonymous and the decision by the court of appeals has contradicted these definitions of law. When a trial court denies a Civ. R. 60(B)(2) motion without a hearing, and that motion set forth grounds warranting relief, supported by evidence tending to cause the judgment to appear unjust, the trial court commits an abuse of its discretion. The decision here of the court of appeals, arbitrarily made, denies that same warranted relief and in doing so created a barrier separating litigant's from any post-judgment relief using newly discovered evidence and constitutes an abuse of discretion. BancOhio National Bank v. Schiesswohl (1988), 51 Ohio App. 3d 130.

The decision of the court of appeals blurs the well established line between what is reviewable/admissible under Civil Rule 60(B) and what is reviewable/admissible upon direct appeal. It is well established that evidence that is not already upon the trial court's record is not reviewable on appeal. McGill v. Roush, 1996 Ohio App. LEXIS 759 - "A reviewing court is limited to considering only evidence that was part of the trial record below. See State v. Ishmail (1978), 54 Ohio St. 2d 402, 377 N.E.2d 500, paragraph one of the syllabus.

Newly discovered evidence cannot be utilized on direct appeal actions and the precedence created by the court of appeals here ignores that fact. The plain language of Civil Rule 60(B)(2) supports the usage of newly discovered evidence and the provision to be relieved of the final judgment entered in this matter and goes to the very merits of the case itself. Civil Rule 60(B)(2) provision provides as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B);"

This provision expressly provides the only proper and lawful avenue to be utilized when introducing newly discovered evidence.

Clearly here the decision of the court of appeals has disregarded the plain language of Civil Rule 60(B)(2), especially and expressly dealing with newly discovered evidence and "what is" and "is not" reviewable upon direct appeal, and if allow to stand will negatively impact the public as a precedence.

Proposition of Law No. 3 :

The use of Civil Rule 60(B)(2), utilizing newly discovered evidence, does not constitute a substitute for a direct appeal, when the evidence used dehors the trial court's record.

Evidence that existed or was known of, including specific facts of events and conduct, but for reasons beyond the movant's due diligence efforts to obtain or have documented, remained unavailable before the trial court's entry, falls under the guise of newly discovered evidence and the plain language of Civil Rule 60(B)(2) itself, and thereby is evidence not reviewable by the appellate courts, and the

provision under Civil Rule 60(B)(2) to introduce such is not by definition a substitute for a direct appeal.

Civil Rule 60 (B) provides in part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)"

The provisions under Civil Rule 60(B) operate after "a final judgment" has been entered. Division (B)(2) operates even more specifically, in that it allows redress of a final judgment up to a year after that judgment has been entered and revolves around the use of "newly discovered evidence" that by its very definition and the statutory intent, is evidence not reviewable upon direct appeal. State v. Ishmail, 54 Ohio St. 2d 402 and Trojanski v. George, 2004 Ohio 2414.

Newly discovered evidence cannot, nor has even been reviewable on direct appeal and as Judge Lawrence Grey, stated in Wagner v. Damagner, 1986 Ohio App. LEXIS 8976, "As an appellate court, we may only review the record." Further in State v. Williams, 2006 Ohio 5660, "Additionally, when reviewing a question of law, an appellate court may only review the record as presented to the trial court." See, Rogers v. Rogers, Butler App. No. CA2004-08-207, 2005 Ohio 2661, P15, citing, State v. Ishmail (1978), 54 Ohio St.2d 402, 377 N.E.2d 500).

The decision by the court of appeals is off base in its determination that the Civil Rule 60(B) motion, based solely on newly discovered evidence and its effect on the findings by the trial court contradicts its purpose under the Constitution of Ohio, Article 1.

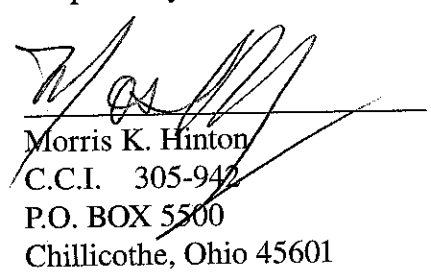
The decision of the court of appeals contradicts its established boundaries of a reviewing court's abilities concerning evidence, especially newly discovered evidence, cognizable under Civil Rule 60(B)

(2) and (5), not direct appeal.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interests and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

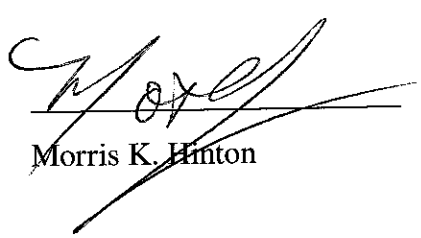
Respectfully submitted,



Morris K. Hinton
C.C.I. 305-942
P.O. BOX 5500
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

A true and accurate copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to Stephen A. Bailey, Drew Law Firm, One West Fourth Street, Suite 2400, Cincinnati, Ohio 45202 on the 26 day of July 2012.



Morris K. Hinton

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MORRIS K. HINTON,

Appellant,

vs.

GARY F. FRANKE,

Appellee.

APPEAL NO. C-120353
TRIAL NO. A-1000931

ENTRY GRANTING MOTION
TO DISMISS APPEAL

ENTERED
JUN 26 2012

This cause came on to be considered upon the motion of the appellee to dismiss the appeal and upon the memorandum in opposition, which was captioned as a motion to strike the appellee's motion to dismiss.

The Court finds that the motion is well taken and is granted.

The Court further finds that the appellant's motion for reduction in the number of copies is overruled as moot.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

D98170345

To the clerk:

Enter upon the journal of the court on JUN 26 2012 **per order of the court.**

By: _____ **(Copies sent to all counsel)**
Presiding Judge

ENTERED
APR 04 2011

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MORRIS HINTON JR.
PLAINTIFF

-VS-

GARY FRANKE, ET AL.,
DEFENDANT.

CASE NO. A1000931

JUDGE JEROME METZ, JR.

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Defendants Gary F. Franke's and Gary F. Franke Co. LPA's Motion for Summary Judgment against Plaintiff. Consistent with the Court's decision dated March 2, 2011, the Court hereby grants Defendant Gary F. Franke's and Gary F. Franke Co. LPA's Motion for Summary Judgment. The Court gave Plaintiff until March 31, 2011 to either voluntarily dismiss the case without prejudice pursuant to Civ. R. 41(A) or to file an affidavit of an attorney in opposition to Defendants' Motion for Summary Judgment. Plaintiff has not filed either. Therefore, the Court hereby grants Defendants' motion for summary judgment and dismisses Plaintiff's case with prejudice. Costs are charged to Plaintiff.

ENTERED
MAR 31 2011

SO ORDERED.

JEROME J. METZ, JR., JUDGE

COURT OF COMMON PLEAS
ENTER
JEROME J. METZ, JR., JUDGE
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

D97322734

ENTERED
APR 19 2012

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MORRIS HINTON JR.
PLAINTIFF

-vs-

GARY FRANKE, ET AL.,
DEFENDANT.

CASE NO. A1000931

JUDGE JEROME METZ, JR.

ENTRY DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIV. R. 60(B)(2)

This matter came before the Court on Plaintiff's motion for relief from judgment pursuant to Civ. R. 60(B)(2). "To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."[1]

Plaintiff seeks to have the judgment entered April 4, 2011, which granted defendant summary judgment, set aside. Plaintiff asserts that he has a meritorious claim to present if relief is granted and that newly discovered evidence which supports his claim entitles him to relief. The Court disagrees. Plaintiff has presented nothing new on his claim for legal malpractice. He submits a letter from Disciplinary Counsel for the Supreme Court of Ohio, which says that no disciplinary action is warranted against attorney Franke. "[T]to establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a

[1] *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St. 2d 146, syllabus 2 (1976).

causal connection between the conduct complained of and the resulting damage or loss."[2] Further, "expert evidence is required in a legal malpractice case to establish the attorney's breach of his duty of care except in cases where the breach or lack thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen."[3]

Plaintiff's claim that Defendant Franke was negligent in his representation of him in the underlying case involving his property requires expert testimony because it is not so obvious that the Court can determine it as a matter of law and because it is outside the ordinary knowledge of a lay person. Plaintiff has failed to submit an affidavit of an attorney establishing that Defendant's conduct fell below the standard of care in that case. He was given an opportunity to do so in response to Defendant's motion for summary judgment, and he has not submitted an affidavit in support of his motion for relief from judgment. Therefore, Plaintiff has not established that he has a meritorious claim and the motion for relief from judgment pursuant to Civ. R. 60(B) is hereby denied.

ENTERED
APR 18 20

COURT OF COMMON PLEAS
ENTER
JEROME J. METZ, JR., JUDGE
SHALL SERVE NOTICE
PURSUANT TO CIVIL
HICH SHALL BE TAXED
COSTS HEREIN.

SO ORDERED.

JEROME J. METZ, JR., JUDGE

JEROME J. METZ, JR., JUDGE

[2] *Vahila v. Hall*, 77 Ohio St. 3d 421, 427 (1997).
[3] *Bloom v. Dieckmann*, 11 Ohio App.3d 202, 203 (1st Dist. 1983).