

Case No. 2015-0112

IN THE SUPREME COURT OF OHIO

CHRISTINE BANGOR

Plaintiff-Appellant,

v.

CHARLES C. AMATO

Defendant-Appellee.

On appeal from the Columbiana County Court of Appeals, Seventh Appellate District

Court of Appeals
Case No. 2014 CO 00009

**MEMORANDUM OPPOSING JURISDICTION OF APPELLEE,
CHARLES C. AMATO**

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**EXPLANATION OF WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

On November 28, 2011, by way of an agreed Separation Agreement and Divorce Decree, Appellant Christine Bangor (“Bangor”), entered into a written contract to settle her divorce, instead of proceeding to trial. Appellee, Charles C. Amato (“Amato”) was Bangor’s attorney at all times relevant during the divorce proceedings. This lawsuit concerns Bangor’s after-the-fact efforts to undo that knowing and voluntary settlement, by way of civil litigation for legal malpractice and fraud against Amato. Bangor’s claimed damages concern the amount of the agreed division of her ex-husband’s pre-marital retirement account and the stipulated amount and length of spousal support she received under the Separation Agreement and Divorce Decree.¹

This case is not about a great public or general interest. Rather, it is a fact-intensive matter amidst an all-too-common theme in domestic relations cases: spurned divorcees are oftentimes angry or indignant when the dust settles on their divorce. But those understandable emotions are improper fuel to propel legal malpractice and fraud claims against a respected member of the bar who endeavored to guide Bangor through that process. The Trial Court and Court of Appeals correctly recognized that Bangor did not deserve a jury trial on such concerns, especially given her complete failure on her burdens of proof. This Court should not waste its valuable time parsing the nonexistent and often inconsistent facts and versions offered by Bangor in her failed attempt to leverage upon her former attorney.

¹ Bangor’s Amended Complaint also sought damages for alleged mental suffering, anguish, humiliation, emotional distress, and punitive damages. However, Bangor did not present any evidence to support these additional damages.

As to Bangor's "fraud" claim, the Trial Court dispensed with that claim on a Motion to Dismiss. Bangor argued that the Ohio Rules of Professional Conduct created a duty upon which a civil action may be premised – a proposition that has been routinely rejected in Ohio jurisprudence. Further, Bangor failed to allege any fact of consequence that created a justiciable conflict of interest, rendering her fraud claim meritless. The Trial Court correctly and swiftly dispensed with this "add-on" claim in the Amended Complaint. The Seventh District Court of Appeals affirmed.

As to legal malpractice, Bangor failed to demonstrate the existence of disputed material fact on the issues of proximate cause and damages. She did not meet her burden of proof in establishing a "case within a case" and that she would have realized a better outcome in the event she had not elected to settle her divorce. She could not prove the amount of the retirement account that she would have received had she gone to trial; she could not prove the amount of spousal support the Trial Court would have actually awarded were the matter not resolved in advance of trial.

In granting summary judgment, the Trial Court excluded Bangor's only offered expert, Peter Sackett. The Trial Court found Mr. Sackett was incapable of rendering a competent expert opinion relative to both the value of retirement account and the spousal support calculation. On appeal, the Court of Appeals appropriately determined that while Mr. Sackett could testify as to certain "standard of care" issues in the underlying divorce, he could not testify as to damages or causation, given his demonstrated lack of expertise on retirement account forensic tracing. The Court of Appeals found that the Trial Court did not abuse its discretion in excluding Mr. Sackett

from opining on the spousal support award, given that his methodology was flawed in not accounting for all statutory factors mandated under R.C. §3105.18.

The well-established law of Ohio that gave rise to the decisions of the Trial Court and affirmation by the Court of Appeals is not a matter of great public or general interest. Nor is Bangor's failure to meet her burden of proof in prosecuting a fundamentally-flawed legal malpractice claim. Rather, the issues raised by Bangor herein only concern the parties in this lawsuit. Bangor's Amended Complaint, distilled, is an effort to obtain more money than she agreed to accept as a settlement of her divorce. That conscious contractual decision – a settlement approved, and expressly found to be “fair and equitable” by the Domestic Relations Division Magistrate and Judge – is not a matter of concern for this Court.

Amato urges this Court to decline jurisdiction. This case does not marginally touch upon great public or general interest. The thorough and well-reasoned decision of the Seventh District should stand as the final resolution of Bangor's pursuits in this regrettable legal drama.

ARGUMENT

Amato's Response to Proposition of Law Number One: Bangor's proposed legal duty still does not give rise to a fraud claim and the claim is not a matter of great public or general interest.

Contrary to Bangor's characterization, the “seminal issue” in this appeal is not whether under any imaginable factual circumstance a lawyer has a duty to disclose previous, unrelated, and personal legal dealings that could serve as a basis for a fraud claim. Rather, the issue in this appeal is whether the allegations in Bangor's Amended Complaint gave rise to such a duty, and whether this issue is of great public or general

interest. To engage the expansive scope suggested by Bangor's Proposition of Law Number One ("Prop. One") would amount to considering and issuing an advisory opinion upon facts that are not at issue in this appeal. It is the well-settled precedent of this Court not to indulge advisory opinions. *State ex. rel Baldzicki v. Cuyahoga Cty. Bd. of Elections* (2000), 90 Ohio St.3d 238, 242, 736 N.E.2d 893.

Thus, whether Prop. One concerns a matter of great public or general interest turns upon Bangor's claim that Prof.Cond.Rs. 1.7 and 8.4(c)-(d) require a lawyer to disclose to his client that opposing counsel has previously represented the attorney in his own personal divorce.² Further, to consider this Appeal, this Court must find it is a matter of great public or general interest that if there is such a duty, it gives rise to a justiciable basis for a civil fraud claim.

Neither of these benchmarks are met and this appeal should be dismissed. The Rules of Professional Conduct do not give rise to a basis (nor should they) for civil liability against an attorney. And even if they could, because Bangor failed to prove proximate cause and damages in a malpractice claim wherein she alleged the same compensatory damages, it logically follows that she could not meet her elemental burden in seeking the same damages upon her fraud claim. Further inquiry into the matter implicates a legal nullity given Bangor's well documented failure of proof.

² Appellant did not specifically plead, as required by Civ.R. 9(B), any of the factual bases at issue in the alleged three other instances where Appellant claims Attorney Hartford served as Amato's counsel. Lacking such specific pleading, any claim premised thereon were defective and subject to dismissal under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. Moreover, such was never a matter of Record below, thereby barring the argument of such alleged facts here, as they are without proper foundation.

As an initial matter, the Court must be cognizant that Bangor's cited duties for the "fraud" claim are found only in the Ohio Rules of Professional Conduct. Accordingly, consideration of Bangor's claim must be guided by the Preamble to the Rules, which states at Paragraph 20 that the Rules are not intended to aid in civil claims against attorneys:

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached...The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Bangor's citation to the Rules of Professional Conduct as the *sole* source of the duties giving rise to her fraud claim was correctly looked upon unfavorably by the Trial Court and Court of Appeals. In declining jurisdiction over this appeal, this Court should likewise closely scrutinize Bangor's loose citation to the Rules of Professional Conduct.

A. Prof.Cond.R. 1.7, as applied and as argued by Bangor, does not and should not give rise to a cognizable fraud claim.

Rule 1.7 is a Rule that governs conflicts of interest for lawyers and their clients. Germane to Bangor's claim, the Rule provides a conflict of interest exists when there is a "*substantial risk* that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited...by the lawyer's own personal interests." (italics in original). Bangor did not plead a "personal interest" arising out of Amato's personal divorce that created a substantial risk that Amato could not competently and fully advocate for Bangor's interests in her own divorce. The pleading failure was recognized by the Trial Court while construing all facts in Bangor's favor. There was no commonality of interest between Amato's personal divorce (wherein his

own personal assets and responsibilities were at issue) versus Bangor's divorce (wherein her own personal assets and responsibilities were at issue).

A "personal interest" is not "personally" knowing the adverse party's attorney. Rather, it has been interpreted as a stake in the outcome of a transaction which would detract from the client's gain. See, e.g., *Davis v. Squire, Sanders & Dempsey, L.L.P.*, 1st Dist. No. C-080774, 2009-Ohio-3613. Amato did not have a "personal interest" in the resolution of Bangor's divorce. He did not stand to receive a portion of Bangor's marital estate based upon the resolution of the action. Nor was Amato's fee arrangement subject to increase/decrease based upon the value of Amato's spousal support award.

Rather, Amato's only "interest" in resolving the divorce was the modest \$3,500.00 flat fee for services rendered – a fee that Bangor refused to pay in full. A legal fee for services rendered is not a "personal interest" sufficient to give rise to an actual conflict of interest, let alone a fraud claim. *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. No. 98861, 2014-Ohio-25 at ¶36-38; *Gullatte v. Rion*, 145 Ohio App.3d 620, 627, 763 N.E.2d 1215 (2nd Dist. 2000). Bangor's advocated case theory is not a request to make new law in this state. It is a re-hash of failed arguments, considered and rejected by multiple appellate courts in Ohio jurisprudence. Accordingly, her failure to plead a *prima facie* claim for fraud is not of great public or general interest and does not warrant this Court accepting jurisdiction.

B. Prof.Cond.R. 8.4, as applied and as argued by Bangor, does not and should not give rise to a cognizable fraud claim.

Similarly, Prof.Cond.R. 8.4 does not serve as a basis for this Court to engage an inquiry into whether Bangor sufficiently stated a claim for fraud. As to Rule 8.4(c), it prohibits a lawyer from engaging in conduct involving fraud, but does not define any

actual duty. When asked to define a duty to give rise to fraud, Bangor refers to a conduct rule that does not define a duty and instead only prohibits engaging in “fraud.” Bangor’s argument is circuitous. There is no rational basis to extend Prof.Cond.R. 8.4(c) to define insular duties relative to civil fraud when the Rule does not define any duty at all, whether civilly actionable or subject to disciplinary sanction.

Rule 8.4(d) also was of no assistance to Bangor’s claims below, nor should it compel this Court to exercise jurisdiction here. That Rule prohibits conduct that is “prejudicial to the administration of justice.” Bangor does not explain, nor can any cogent argument be made, as to how this Rule demonstrates why this case is of great public or general interest.

Finally, Bangor cannot be heard to argue that she should have been permitted to conduct further discovery on the issue of fraud. The Trial Court correctly stopped this “fishing expedition” in its tracks. The very reason that Civ.R. 9(B) requires fraud to be pled with particularity is because it is the type of claim that should not be asserted haphazardly. A defendant must be given notice of the precise statement, including when and where it was made and the nature of what was obtained or given as a consequence of the fraud. *Schroeder v. Henness*, 2nd Dist. No. 2012 CA 18, 2013-Ohio-2767; *Brown v. Sasak*, 11th Dist. No. 2009-A-0054, 2010-Ohio-2676. Pursuant to Civ.R. 11, Bangor’s counsel verified that there were good grounds for the claim, but when pressed, was unable to define the duty and/or adduce any proof that Amato being previously represented by Attorney Hartford materially altered the result of Bangor’s divorce. Imprecise and improper pleading practices are not a matter of great public or general interest.

C. Even if a duty existed, Bangor cannot demonstrate proximate cause or damages, rendering any further consideration of the issues superfluous.

Finally, even if the Court agreed that Bangor's claims warranted review, and even if the Court found that Ohio law requires an attorney to disclose to his client that he has been previously represented in unrelated matters by opposing counsel, it would still be of no consequence to Bangor's claims. Bangor did not specifically plead how the alleged failure to disclose caused her actual monetary damages. Nor could she prove such damages if the matter had proceeded beyond a Civ.R. 12(B)(6) inquiry. The Trial Court and Court of Appeals correctly decided that Bangor failed to create an issue of fact relative to her alleged damages upon her "case within a case" burden. Even if a breach of duty occurred, there is no proof of legally recognizable damages and/or proximate cause within the Record.

The compensatory damages sought on the fraud claim are the same damages sought on the malpractice claim. Bangor could not prove these damages, even when given a year to conduct discovery and file multiple briefs upon the issue. In truth, Bangor's "fraud" claim is just another way of re-stating her malpractice claim, which is also an impermissible pleading practice. Legal malpractice masquerading as "fraud" is ripe for a motion to dismiss. See, e.g., *Gullatte v. Rion*, 145 Ohio App.3d 620, 627, 763 N.E.2d 1215 (2nd Dist. 2000). Where claims of a former client relate to the manner in which an attorney proceeded during representation of the client, the former client's claim is for malpractice, not fraud. *Bohan v. Dennis C. Jackson Co., L.P.A.*, 188 Ohio App.3d 446, 2010-Ohio-3422, 935 N.E.2d 900. "Malpractice by any other name still constitutes malpractice." *Pierson v. Rion*, 2nd Dist. No. CA 23498, 2010-Ohio-1793 (April 23, 2010), citing *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, 446 N.E.2d 820.

As this Court has stated, malpractice is defined as “the professional misconduct of members of the medical profession and attorneys.” *Richardson v. Doe* (1964), 176 Ohio St. 370, 1999 N.E.2d 878. “Such professional misconduct may consist either of negligence or of breach of the contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice.” *Id.* at 89-90. Bangor failed to carry her burden on her malpractice claim. She does not get a “re-do” on this lawsuit by simply calling the claim something else.

Whether or not Bangor can convince this Court to create a legal duty that currently does not exist in Ohio jurisprudence will not affect the fact that she cannot recover for a breach of that duty, given the paltry state of the Record evidence below upon the issues of damages and causation. Accordingly, this case is not a matter of great public or general interest and this Court should not expend its valuable resources in assisting Bangor in retroactively pleading a claim where she previously failed to do so within the bounds of the accepted law.

**Amato’s Response to Proposition of Law Number Two:
Bangor’s appeal of the malpractice claim amounts to mere disagreement with the Court of Appeals, not an issue of overriding great public or general interest.**

As Bangor concedes, the “seminal issue involved in this appeal” is reflected in her Proposition of Law Number One.³ (See Bangor’s Memorandum at pg. 4). This characterization perhaps explains why her Proposition of Law Number Two (“Prop. Two”) is completely inappropriate for a jurisdictional appeal to this Court. At its core, Prop. Two reflects nothing more than Bangor’s disagreement with the rationale of the Court of

³ It is interesting to note that Bangor’s second cause of action in the Amended Complaint is now the poster child for this appeal when both counts were summarily decided by the Trial Court.

Appeals and Trial Court. Though Bangor contends that the Court of Appeals “failed to consider and did not address Ms. Bangor’s argument,” the statement belies the Record.

Indeed, Bangor advanced this same position when she filed her App.R. 26(A) Motion to Reconsider with the Seventh District following the Court’s 3-0 opinion in favor of Amato affirming summary judgment. In rejecting the argument in its January 16, 2015 Judgment Entry, the Court of Appeals expressly indicated that it fully considered every argument levied by Bangor: “This court considered all issues raised by Bangor.” There is a fundamental difference between an argument being considered and rejected versus it being outright ignored and Bangor’s attempted appeal does not recognize this key distinction.

What is more, even if Prop. Two merited further scrutiny, its factual and legal assertions are falsely premised. Among other failures of Bangor’s argument relative to the exclusion of Mr. Sackett’s opinion, Bangor ignores the applicable standard of review for the exclusion of expert evidence pursuant to Evid.R. 702. The Court of Appeals was bound to review the matter for an abuse of discretion, not *de novo* as Bangor contends. *Theis v. Lane*, 6th Dist. No. WD-12-047, 2013-Ohio-729. Under the correct standard of review, the Court of Appeals appropriately rejected Bangor’s invitation to substitute its judgment on evidentiary matters for that of the Trial Court. This court should likewise rebuff Bangor’s argument.

But even if this Court accepted Prop. Two for consideration, it would still reach the same conclusion – Mr. Sackett’s opinions relative to Bangor’s claimed damages were inexpert and inadmissible. Bangor wanted the Domestic Relations Court, the Trial Court, and the Court of Appeals to ignore all the actual facts of Record relative to the

retirement account, and instead merely split the retirement account in half between Bangor and her ex-husband. This in spite of the fact that this account was a heavily pre-marital asset of Mr. Bangor. In essence, Bangor's underlying Amended Complaint contended that she should have obtained an inequitable windfall worth hundreds of thousands of dollars in relation to an account where all Record evidence established that she had no legal right or claim therein. And because she did not receive this windfall, Bangor now contends her former attorney should have to pay the price. It is this inequitable and legally contrarian pursuit that brings her before this Court on a jurisdictional appeal. Not an issue of great public or general interest.

Furthermore, the Record is devoid of evidence that the Domestic Relations Court would have done as Bangor claims. Mr. Sackett's opinion in this respect was pure speculation. Especially in the face of the Domestic Relations Court's actual judgment entries wherein it found the settlement of Bangor's divorce to be fair and equitable. In light of such facts, Bangor could not prove a case-within-a-case based upon the Record evidence as to the retirement account under *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173. To the contrary, the Record only reflects evidence that the actual determinations of the court-approved forensic accountant (Mr. Coco) were correct. Precisely the reason summary judgment was warranted and the Court of Appeal's affirmance of same was proper.

In addition, Bangor's reference to Mr. Coco as "Mr. Bangor's" expert is inaccurate. The parties to the divorce agreed to a single forensic accounting of the retirement account. It was a customary measure employed by both parties as well as domestic courts to avoid the unnecessary dispute over property calculations involved in

tracing funds over time through a retirement account. It was appropriate, especially since Mr. Coco is recognized as the preeminent authority for performing such services in the Columbiana County legal community and beyond. Bangor essentially claims that the Domestic Relations Division should have excluded her own expert, and that as a result, she would have realized a larger monetary gain than she was entitled to under the law. That is not a proper basis for a claim of legal malpractice, nor is the failure of the claim sufficient grounds for a jurisdictional appeal to this Court.

Mr. Sackett could not opine as to the valuation of the retirement account as a mixed pre-marital and marital asset. He lacked the necessary training and expertise to perform such analysis. Bangor's reliance upon him as proof of the exact amount the Trial Court would have concluded relative to the retirement account was erroneous. Accordingly, the Court of Appeals correctly determined the Trial Court did not abuse its discretion in excluding his unfounded opinions.

Similarly, Mr. Sackett's spousal support opinion was offered without proper expert foundation. His failure to account for the factor of the marital debt assumed by Mr. Bangor was fundamentally and statutorily flawed. Bangor's only "evidence" concerning the marital debt was the post-deposition, self-serving, and contradictory affidavit of Bangor wherein she claimed that certain marital debts were inflated. The Trial Court and Court of Appeals correctly determined under the well-accepted law that this conclusory affidavit did not create an issue of fact sufficient to avoid summary judgment. *Durick v. eBay, Inc.*, 7th Dist. No. 05MA198, 2006-Ohio-4861; *Pinchot v. Mahoning Cty. Sheriff's Dept.*, 7th Dist. No. 05 MA48, 2005-Ohio-6593.

During the pendency of this case below, Bangor did not introduce actual documents corroborating her position that reflected different account balances of the marital debt assumed by her ex-husband. Although Bangor postured the claim of inflated debt, she failed to offer any evidence that the amount of debt assumed by Bangor's ex-husband was actually incorrect.

Contrary to Bangor's typification of the evidence, the Trial Court did not exclusively rely upon alleged hearsay to find that there was a large amount of marital debt assumed by Bangor's ex-husband. The Court of Appeals summarily referred to the testimony of Attorney Hartford wherein he noted that the Domestic Relations Division's Magistrate commented on the high amount of marital debt assumed by Mr. Bangor. The Record is also replete with admissible evidence substantiating the claim. Bangor confirmed these debts at her own deposition, wherein she admitted that her ex-husband assumed \$198,121.49 in marital debt while she assumed \$0.00 in marital debt:

1. Mr. Bangor assumed over \$107,000 on the marital home mortgage (the exact amount was \$109,047.04) (Bangor's Depo. at pg. 130 and Exhibit 7 thereto);
2. Mr. Bangor assumed all marital medical debt in the amount of \$43,019.61; (Bangor's Depo. at pg. 190; Hartford Depo. at pgs. 84, 125);
3. Mr. Bangor assumed the nonmedical debt of \$46,630.10 (Bangor's Depo. at pg. 190; Hartford Depo. at pg. 125);

Bangor contends that this Court should engage in a detailed factual review of the summary judgment evidence to determine whether Bangor presented competent and sufficient expert testimony and factual proof for her claims. This is an improper basis for a discretionary appeal. See, e.g., *Pixley v. Pro-Pak Indus., Inc.*, 2014-Ohio-5460, ¶128

(Pfeifer, J., dissenting); *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2008-Ohio-4082, 893 N.E.2d 1287, ¶7 (O'Connor, J., concurring). Amato urges this Court to decline Bangor's invitation to engage in re-litigating an issue that must be reviewed for an abuse of discretion, especially where the actual Record evidence belies Bangor's positions. Accordingly, Amato requests that the Court decline jurisdiction over Bangor's Proposition of Law Number Two.

CONCLUSION

Bangor's Propositions of Law do not warrant further scrutiny. Bangor's failed efforts to elicit financial gains in addition to her agreed resolution of her divorce is not a matter of great public or general interest. Her arguments have been fully vetted, briefed, and argued again and again. Accordingly, Amato urges this Court to decline jurisdiction as to both Propositions of Law set forth by Bangor.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing MEMORANDUM OPPOSING JURISDICTION OF APPELLEE was sent by regular U.S. Mail to **Andrew J. Simon, 6000 Freedom Square Drive, Freedom Square II, Suite 165, Independence, OH 44131**, counsel for Appellant on this 29th day of January, 2015.

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