NO. 90161-9

SUPREME COURT
OF THE STATE OF WASHINGTON

ROSE TOWNSEND TRUST FOR DONALD TOWNSEND, et al.

Plaintiff/Appellant,

v.

SCOTT R. SMITH,

Respondent.

ANSWER TO PETITION FOR REVIEW

James B. King, #8723
Christopher J. Kerley, #16489
Markus W. Louvier, #39319
Michael E. McFarland, Jr., #23000
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I. INTRODUCTION

In its legal malpractice case against respondent Scott R. Smith (Mr. Smith) petitioner Rose Townsend Trust for Donald Townsend, et al. (the Trust): (1) failed to support its case with expert testimony establishing the standard of care and its breach; (2) chose not to appeal the trial court's grant of summary judgment in favor of another lawyer defendant and his firm on the statute of limitations, and; (3) delayed seeking leave to amend its Complaint to assert a new claim against Mr. Smith until shortly before trial.

Because the Trust lacked supporting expert testimony, the trial court dismissed the Trust's case against Mr. Smith. It also denied the Trust's Motion for Leave to amend its Complaint.

The Trust appealed. Division III of the Court of Appeals affirmed by unpublished opinion, and denied the Trust's Motion for Reconsideration.

The Trust now seeks discretionary review of the Court of Appeals' decision. For the reasons set forth below, Mr. Smith respectfully submits that the Trust's Petition should be denied.

II. COUNTERSTATEMENT OF THE CASE[1]

A. Allegation that Mr. Smith missed a statute of limitations while representing the Trust

In an effort to establish its legal malpractice case as one for which no supporting expert testimony was required, the Trust re-characterizes its malpractice claim against Mr. Smith as one for alleged failure to comply with the applicable statute of limitations. However, nowhere in its two Complaints against Mr. Smith did the Trust accuse Mr. Smith of failing to meet an applicable statute of limitations. On June 2, 2010, the Trust filed its First Amended Complaint for Damages [for legal malpractice] against Mr. Smith. CP 1-50. Therein, the Trust identified/articulated its malpractice claim against Mr. Smith as follows:

> ...
>
> 3.3 Mr. Smith breached the duty to exercise the skill, care, and knowledge ordinarily exercised by attorneys similarly situated by failing to advise the Townsend Trust that by waiving the creditors claim against Daryl Johnston, the Johnston State Court Judgment would be rendered unenforceable, and by failing to advise the Townsend Trust that the unrecorded Johnston Bankruptcy Judgment would be junior to any other recorded liens or recorded judgments against the Johnston Homestead Property.

[1] The Trust's Statement of the Case reads more like argument than a recitation of facts as contemplated by RAP 13.4(b)(6). Nevertheless, Mr. Smith, in his Counterstatement of the Case, addresses the Trust's contentions in the order presented.

> 3.4 Mr. Smith should have known that the unrecorded Johnston Bankruptcy Judgment was not a lien that was first, senior and fully perfected with respect to any other liens.
>
> 3.5 Mr. Smith should have known that a waiver of the Creditors Claim in the Johnston Bankruptcy proceeding would render the Johnston State Court Judgment unenforceable.
>
> 3.6 Mr. Smith's errors constituted both a negligent act and breach of a contractual obligation owed the Townsend Trust.
>
> 3.7 Mr. Smith's errors caused harm in an amount to be proved at trial.

In a Second Amended Complaint, filed on November 10, 2010, the Trust added as a defendant the law firm of Delay, Curran, Thompson, Pontarolo and Walker, P.S. CP 51-101. The Trust alleged that Delay, Curran, through attorney Joseph Delay, "breached the duty to exercise the skill, care, and knowledge ordinarily exercised by attorneys similarly situation by creating a document, namely the "assignment of judgment"...which caused the Townsend Trust to forfeit its right to collect on the Johnston state court judgment. *Id.*

The allegations of negligence against Mr. Smith in the Second Amended Complaint were identical to the allegations in the First Amended Complaint, although the Trust did add the contention that "Mr. Smith should have taken steps to modify the creditors claim from an

unsecured non-priority claim to a secured priority claim in the bankruptcy of Darrell Johnson." CP 51-101, paragraph 3.6.

As recognized by both the trial court and the Court of Appeals, this case involved complicated and obscure issues of bankruptcy and debtor/creditor law, and that is why expert testimony on the standard of care and breach was required. To set up its argument that no expert testimony was required, the Trust now completely recasts its claim against Mr. Smith as one of simply failing to comply with the statute of limitations. The Trust's Petition should not be allowed to rest on this false premise.

B. Argument that Mr. Smith is somehow "bound by" the decision of the trial court dismissing attorney Joseph Delay

The Trust chose not to appeal the trial court's summary judgment in favor of Delay, Curran on the statute of limitations. Perhaps recognizing this as a tactical misstep, the Trust now attempts to somehow make Mr. Smith a party to Delay, Curran's Motion. The Trust contends that, because Mr. Smith was a "party" to Delay, Curran's Motion, the trial court's decision thereon became the "law of the case" or "res judicata" against Mr. Smith. Mr. Smith is unaware of any authority supporting such a result. The mere fact Mr. Smith was a named defendant did not make him a party to Delay, Curran's motion. Further, Mr. Smith's receipt of copies of the

Trust and Delay, Curran's moving papers, as required by CR 5, did not make Mr. Smith a party to that motion.

C. Claim that Court of Appeals "misapprehended" the facts and trial court's basis for dismissing the Townsend Trust's action

The trial court dismissed the Trust's claim against Mr. Smith because the Trust lacked supporting expert testimony. The Trust asserts the Court of Appeals incorrectly assumed that the Trust argued Mr. Smith had a duty to record the July 2005 Assignment of Judgment. But, even if the Court of Appeals made that assumption, it is immaterial.

The Trust goes on to state/argue the Court of Appeals erroneously concluded the Trust's malpractice claim against Mr. Smith involved "gray areas of law in a complex federal bankruptcy matter." On the nature of the Trust's claims against Mr. Smith, the allegations contained in the Trust's First Amended and Second Amended Complaints speak for themselves. The decisions of Bankruptcy Court Judge Patricia Williams (CP 381-409), Judge Lonnie Suko (CP 425-432) and the Ninth Circuit Court of Appeals (CP 434-438) further illustrate the complex nature of the bankruptcy and debtor/creditor standard of care issues.

As it did before the Court of Appeals, the Trust argues Mr. Smith himself "set the standard of care" regarding the "negligent act" by Mr. Delay by testifying at his deposition in 2005 that the Assignment was

"very poorly drafted" and had "sloppy language in drafting" by Mr. Delay[2]. CP 234, 241. However, mere poor drafting does not mean the document failed to comply with the standard of care.[3]

The Trust next argues the trial judge "set the standard [of care] in April 2011 for Mr. Smith's omissions when she implicitly held that Mr. Smith knew of the cause of action, had a duty to inform his client of the cause of action, and failed to do so." Not only is this speculative, it is contrary to the law. It is not legal malpractice to fail to advise a client of a potential legal malpractice claim before the client actually has a viable claim. *See e.g. Frederick v. Meighan*, 75 A.3d 528, 905 N.Y.Supp.2d 635 (2010).

It should also be noted that the trial court's grant of summary judgment in favor of Delay, Curran was not based on any conclusion Mr. Delay had committed malpractice. Rather, the summary judgment ruling was on the basis of the statute of limitations, with the trial court finding that the Trust, on or before the expiration of the applicable statute of

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[2] It is worth noting that, despite this testimony from Mr. Smith in 2005, the Trust did not seek, until its Reply Brief in opposition to Mr. Smith's March 2012 Motion in Limine, to amend its Complaint to assert that Mr. Smith was negligent for not advising the Trust it had a potential malpractice case against Mr. Delay.

[3] Joseph Delay is a Spokane attorney with 62 years of experience in real estate and bankruptcy matters. His many professional accomplishments include the Presidency of the Washington State Bar Association, a position on the Board of Governors of the Washington State Bar Association, and a listing in the Best Lawyers in America.

limitations, had some information a possible cause of action against Mr. Delay and his firm. (CP 109-133).

III. PETITIONER'S ARGUMENT AS TO WHY THIS COURT SHOULD ACCEPT REVIEW

A. Claim that the Court of Appeals decision conflicts with a decision of this Court

To set up this argument, the Trust, again, recasts its claim against Mr. Smith as one of failing to comply with the statute of limitations. As the Trust's two Complaints against Mr. Smith show, that was not the Trust's claim below.

The Trust claims the Court of Appeals "misapprehended" *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979), regarding the circumstances under which expert testimony is necessary in a legal malpractice case. In *Walker*, the court described the circumstances under which expert testimony is necessary in a legal malpractice case as follows:

> This case involves allegations of negligence pertaining the trial tactics and procedure, matters frequently difficult to prove. See R. Mallen and V. Levit, Legal Malpractice, §345 (1977). Further, the case involves a maritime claim, a special area of practice. While expert testimony is not necessary when the negligence charged is within the common knowledge of lay persons, we believe that expert testimony was both proper and necessary in this instance.

92 Wn.2d at 858. (emphasis added)

Moreover, in *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992), the court declared that, in order to comply with the applicable duty of care, an attorney must "exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." Query how a plaintiff can establish the standard of care and its breach without expert testimony.

B. Claim that decision of Court of Appeals conflicts with an unpublished decision of the Court of Appeals

The Trust argues the decision of the Court of Appeals conflicts with an unpublished decision from Division II, *Schmidt v. Coogan*, 2008 WL 5752059 (2008). There, the trial court held that no expert testimony was required where the defendant attorney waited until the day before the statute of limitation expired to file a premises liability case on behalf of his client, then named the wrong defendant. As a result of this error, the premises liability case was dismissed. Pursing a case against the correct defendant was impossible because the statute of limitations had expired. Coogan, the attorney defendant, admitted at a deposition that he could not imagine a scenario in which the failure to identify the proper defendant in a personal injury case would not be negligent. In holding expert testimony was not required in this situation, the Court of Appeals cited *Walker* for

the proposition that expert testimony is not required "when the negligence charged in within the common knowledge of lay persons." *Schmidt* at page 2.

Here, the Court of Appeals' decision was consistent with *Schmidt*, just as it was consistent with *Walker*. The trial court, and the Court of Appeals, held that because both the standard of care and breach involved complicated issues of bankruptcy and debtor creditor law, expert testimony was required.

The Trust argues ER 702 "expressly discusses experts as being helpful, but not mandatory." But ER 702 does not trump the judicially created requirement for expert testimony in professional liability cases where the issues are beyond the understanding of laypersons. If it did, no expert would ever be required in a medical or legal malpractice case, despite the complexity of the issues.

Finally, the Trust cites *Watkins v. Shepherd*, 278 So.2d 890 (1972), for the general proposition that, in certain cases, the trial court is competent to make a determination on the standard of care without the assistance of expert witnesses. Mr. Smith has no quibble with this basic proposition. If the alleged violation of the standard of care is something as legally straightforward as a lawyer's failure to object to clearly inadmissible – and damaging – evidence at trial, or, like in *Schmidt*, a

lawyer's failure to commence a personal injury case against the proper defendant, no expert testimony is required. But here, the alleged legal malpractice involved complex issues of bankruptcy and debtor/creditor law, requiring expert testimony on the standard of care and its breach.

A logical extension of the Trust's argument is that expert testimony is never required in a legal malpractice action tried to the bench because, even in the most complex of cases, the parties can educate the judge on the law as the trial progresses. Following the Trust's reasoning, a plaintiff could convert any trial court judge into an expert witness in a legal field as esoteric as federal income taxation or SEC rules and regulations concerning mergers and acquisitions. Not only is this not the law, but such a practice would place an onerous burden on a trial court judge.

IV. CONCLUSION

For the reasons set forth above, Mr. Smith respectfully request that the Trust's Petition for Discretionary Review be denied.

DATED: May 22, 2014

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 22nd day of May, 2014, the foregoing was delivered to the following persons in the manner indicated:

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Amos R. Hunter Amos R. Hunter, P.S. 1318 W. College Avenue Suite 100 Spokane, WA 99201	HAND DELIVERED [X]

May 22, 2014 /Spokane, WA /s/Christopher J. Kerley
(Date/Place)

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Dear Clerk:

Please see attached for filing Answer to Petition for Review.

Case Name: Townsend Trust v. Smith
Case No.: Supreme Court No. 90161-9

Filers:

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