

1992

Harline G. Harline v. Ronald C. Barker and Larry Whyte : Petition for Rehearing

Utah Court of Appeals

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Paul N. Cotro-Manes; Attorney for Plaintiff/Appellant.

Thomas L. Kay; Mark O. Morris; Snell & Wilmer; Attorneys for Defendants/Appellees.

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IN THE UTAH COURT OF APPEALS

WESLEY G. HARLINE,	:	
	:	
Plaintiff/Appellant,	:	Case No. 920113-CA
	:	
v.	:	
	:	
RONALD C. BARKER and LARRY	:	
WHYTE,	:	
	:	
Defendants/Appellees.	:	

APPELLEES' PETITION FOR REHEARING

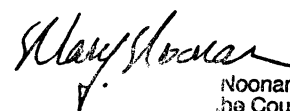
APPEAL FROM AN ORDER OF SUMMARY JUDGMENT ENTERED
BY THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA

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FILED
Utah Court of Appeals

JUN 10 1993


Mary Houser
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WESLEY G. HARLINE,	:	
	:	
Plaintiff/Appellant,	:	Case No. 920133-CA
	:	
v.	:	
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TABLE OF CONTENTS

INTRODUCTION	1
FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
A. THE TRIAL COURT CORRECTLY RULED THAT WITHOUT EVIDENCE OF CAUSATION, HARLINE’S CLAIMS FAIL	6
B. HARLINE’S FAILURE OF PROOF ON DUTY AND BREACH IS FATAL TO HIS CLAIMS	10
CONCLUSION	12
CERTIFICATION	13

TABLE OF AUTHORITIES

<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	7
<u>Chiero v. Chicago Osteopathic Hosp.</u> , 392 N.E.2d 203 (Ill. App. 1979)	11
<u>Dunn v. McKay, Burton, McMurray & Thurman</u> , 584 P.2d 894 (Utah 1978)	8
<u>Dybowski v. Ernest W. Hahn, Inc.</u> , 775 P.2d 445 (Utah App. 1989)	7
<u>Reeves v. Geigy Pharmaceutical, Inc.</u> , 764 P.2d 636 (Utah App. 1988)	6
<u>Robinson v. Intermountain Health Care, Inc.</u> , 740 P.2d 262 (Utah App.	8, 11
<u>Wycalis v. Guardian Title of Utah</u> , 780 P.2d 821 (Utah App. 1989)	6

INTRODUCTION

Appellees Ronald C. Barker and Larry Whyte (hereafter "Attorneys"), pursuant to Rule 35 of the Utah Rules of Appellate Procedure, respectfully submit this Petition for Rehearing. This Court should grant the Petition for the reason that Rule 56 U.R.C.P., in conjunction with Rule 4-501(2) U.C.J.A., required Appellant (hereafter "Harline"), as a party opposing Attorneys' motion for summary judgment, to come forward with affirmative evidence in support of each element of his claim on which he bears the burden of proof. This Court acknowledged and reaffirmed this rule of law when it stated that "*To avoid summary judgment, Harline must establish some competent evidence to support each element of his legal malpractice claim.*" Opinion, attached hereto as Exhibit "A", at p. 3 (citation omitted). Yet of the four elements of Harline's legal malpractice claim, there is no record evidence supporting three of those elements. Any supposition about what a juror might ultimately do at trial ignores the fundamental failure of Harline's case below — Harline came forward with no admissible or material evidence upon which a reasonable juror could find for him.

In the Opinion, this Court identified and reaffirmed many important principles relating to legal malpractice actions and standards for summary judgment. Yet in reversing the trial court's finding that there were no genuine issues of material fact, this Court overlooked or misapprehended Harline's factual record and applied correct legal principles in a factual vacuum. In other words, while summary judgment should be reversed when a reasonable juror might view the evidence and find in favor of the party

opposing summary judgment, that evidence must have been brought forward in opposition to summary judgment. Harline brought no evidence forward to the trial court on three essential elements to his claims. Because Harline failed to do this, and because this Court incorrectly assumed that there was admissible record evidence upon which a juror could deliberate, this Court should rehear the matter and affirm the lower court's ruling in favor of Attorneys.

FACTS

Most of the salient facts are articulated and set forth at pages 1-3 of the Opinion, and are incorporated herein. However, one "fact" set forth in the Opinion is not supported by the record, and likely flows from the unwarranted presumptions about the factual record that serve as the basis for the Opinion. On page 2 of the Opinion, after pointing out that Attorneys had represented Harline in his bankruptcy without reviewing the docket, this Court stated that "[a]s a consequence [of that failure, Attorneys] filed no amendments to Harline's deficient bankruptcy schedules, nor did they advise Harline to amend his schedules." This statement is speculation, and nothing in the record suggests that Harline's failure to amend his fraudulent and false schedules was a "consequence" of Attorney's acts or omissions.

In addition to those facts set forth in the Opinion, other facts bear upon this appeal, particularly on its procedural posture, and should be considered with this Petition.

1. All non-expert discovery in the case was to have been concluded by June 3, 1991, more than a month before the summary judgment hearing. (R. at 240).

2. In their Reply Memorandum, Attorneys argued to the trial court that, "there are no facts which Harline and his counsel have asserted or could assert to change the fact that Defendants never had a legal duty to amend the schedules and statements in Harline's bankruptcy." (R. at 150-151)

3. In their Supplemental Memorandum in support of their motion, Attorneys pointed out to the trial court that Harline was obligated to come forward with supporting evidence. "Discovery is over. Harline's opportunity to amass evidence supporting his claims has passed, and he must come forward, now, with evidence supporting each of the elements of his claims against [Attorneys]. Harline's failure to produce evidence now, in opposition to Defendants' motion, should compel this court to grant summary judgment in favor of Defendants." (R. at 250).

4. Harline had retained an expert witness, Herschel Saperstein, before the hearing on Attorneys' motion for summary judgment (R. at 240), but presented no evidence by way of deposition or affidavit from Mr. Saperstein. As a result, there was a complete failure of proof on Harline's essential elements of establishing the standard of care and a breach of that standard.

5. Harline presented no record evidence to the trial court in support of the proximate causation element of his claims. In other words, Harline presented no evidence to suggest that even if Attorneys had persuaded Harline to file amended schedules, the bankruptcy court would have elected to ignore Harline's admittedly

fraudulent conduct towards his creditors and the bankruptcy court and granted a discharge.

6. In their Statement of Facts as to Which No Genuine Issue Exists, set forth pursuant to Rule 4-501(2)(a) U.C.J.A., Attorneys pointed out that Harline's denial of discharge was caused by the bankruptcy court's finding that Harline had acted fraudulently before and after his bankruptcy filing. (R. at 247-249).

7. Harline did not set forth any factual averments, supported by citations to the record, disputing Attorneys' statement that it was Harline's fraudulent conduct that caused the denial of his discharge. Therefore, Attorneys' allegation of causation was undisputed, and deemed admitted under Rule 4-501(2)(b) U.C.J.A.

SUMMARY OF ARGUMENT

Attorneys readily acknowledge the standards to be applied to summary judgment motions. In particular, Attorneys acknowledge that if there is a genuine issue of fact, summary judgment is inappropriate. There was no genuine issue of fact presented to the trial court because Harline submitted no evidence to create such an issue. This Court framed the key issue as follows:

The question we must focus upon is if defendants had persuaded Harline to amend his schedules to include the prefiling, gratuitous transfers, the Merrill Lynch account, the partnership interest, and correctly state his address, a reasonable juror could conclude the court would have allowed the discharge.

Opinion at 11.

The reason why this Court should rehear this matter is simple: No reasonable juror could conclude that an amended schedule would have persuaded the bankruptcy court to allow a discharge in the absence of some evidence that the court would have ruled differently. Harline came forward with no evidence on that issue, and so there is nothing for a juror to deliberate on. Further, Attorneys' statement on the causation issue was undisputed, and therefore admitted. Harline failed to meet his burden of proof, and his case should be dismissed.

Harline also failed to present the necessary expert testimony in support of two other elements essential to his case, existence of duty and breach thereof. In the Opinion, this Court stated that Attorneys "for the first time on appeal claim summary judgment was appropriate because Harline failed to produce expert testimony that defendants had breached their standard of care." Opinion at 4, n. 2. This Court overlooked or misapprehended the fact that at the trial court, Attorneys argued that Harline did not have any evidence to support his claims that Attorneys breached their duties to him, expert or otherwise. This Court's refusal to acknowledge this fatal omission in Harline's case ignores the whole premise to Attorneys' motion, i.e., Harline had no evidence supporting essential elements of his claims. Describing the kind of evidence Harline failed to offer does not recategorize Attorneys' argument into one that was not presented to the trial court. It was.

This Court has acknowledged the necessity of expert testimony to establish the essential elements of standard of care and breach in a professional malpractice action.

Opinion at 4, n. 2; Wycalis v. Guardian Title or Utah, 780 P.2d 821, 826 n. 8 (Utah App. 1989). Harline was apparently aware of this requirement since he retained the services of a prominent bankruptcy attorney, Herschel Saperstein, to testify as an expert. Yet the record contains no evidence in the form of an affidavit of or deposition by Mr. Saperstein establishing the appropriate standard of care or the alleged breach thereof. Without that required evidence, summary judgment was appropriate. For this Court to rule that Attorneys' motion fails because they did not label the evidence Harline needed to establish his case is at odds with the policies behind Rule 56 and the adversary system. If a party is required to educate opposing counsel on the precise nature of evidence the other party must present, a party's burden of proof will be reduced to meeting only specific objections to proof. Dismissals short of a full trial on the merits will only be appropriate when plaintiff fails to satisfy an evidentiary checklist supplied by opposing counsel. That is not the law.

ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT WITHOUT EVIDENCE OF CAUSATION, HARLINE'S CLAIMS FAIL.

In the Opinion, this Court correctly stated that Harline had to establish "some competent evidence" in support of each of his claims to avoid summary judgment. Opinion at p. 3. This is consistent with other decisions of this Court, and with the policies behind Rule 56. See, e.g., Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 640 (Utah App. 1988) ("[N]on moving party's failure of proof concerning one essential

element of that party's case necessarily renders all other facts immaterial.") (citing to Celotex Corp. v. Catrett, 477 U.S. 317 (1986)); and Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445, 447 (Utah App. 1989) ("We conclude that [plaintiff] has failed to raise any material issues of fact beyond a 'bare contention' that [Defendant] was somehow negligent. That being the case, the trial court properly granted summary judgment against her.").

The U.S. Supreme Court's standard for summary judgment under Federal Rule 56, apparently adopted in Utah, makes clear that Harline, with the burden of proof on causation, would be obligated to come forward with evidence on the causation issue.

But we do not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the non-moving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" -- that is, pointing out to the District Court -- that there is an absence of evidence to support the non-moving party's case.

Celotex, 477 U.S. at 325 (emphasis added). Here, Attorneys did just as the U.S. Supreme Court suggested, pointing out that discovery was over and that Harline had no record evidence supporting his claims. When Attorneys pointed this out, the burden shifted to Harline to come forward with admissible evidence. Harline did not do so. Also, Harline's failure to dispute, with record evidence, Attorneys' Statement of Undisputed Facts that Harline's denial of discharge was caused by Harline's conduct

constitutes an admission under Rule 4-501(a)(b) U.C.J.A. Thus, the causation issue was determined in favor of Attorneys.

In Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987), this Court affirmed summary judgment in the absence of proof on the causation issue. Similarly here, while this Court may entertain speculation about what the bankruptcy court may have done if Harline had amended his schedules, Harline produced no evidence from which a juror could infer a different result. There is no evidence tending to show what the bankruptcy judge would have done if Harline had amended his schedules. Harline had the obligation as the plaintiff to present competent evidence on this causation issue. Harline failed to do this. To suggest that a reasonable juror would be permitted at trial to guess as to what the bankruptcy court may have done 5 years ago, in response to an amendment to schedules that only confirmed Harline's admittedly fraudulent conduct, would permit jurors to speculate on causation without any evidence before them. That is not the law.

The Utah Supreme Court faced a nearly identical situation in Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978). There, the court was asked to determine whether the trial court was correct in granting the defendants' motion for directed verdict. The plaintiff's husband had filed for divorce in Florida. Plaintiff retained the defendants to file a divorce action in Utah. Defendants filed a divorce action in Utah but were unsuccessful in obtaining personal service on the husband. Defendants obtained an order allowing for service in Florida by mail. However, instead of having

the clerk mail the summons and complaint as required by the Rules of Civil Procedure, the defendants mailed the summons and complaint themselves. This apparently led to a delay in the Utah proceedings. The plaintiff claimed that the delay in the Utah divorce proceedings caused her to lose custody of her two children and to incur the expense of retaining legal counsel in Florida.

In affirming the directed verdict, the Supreme Court found that the plaintiff's own conduct and voluntary decision resulted in her children moving from Utah to Florida. Furthermore, the Court found that it was mere conjecture as to what would have happened to the children had there been no delay in the Utah divorce action, i.e., there was no evidence to suggest the Utah court would have awarded plaintiff custody. Based on these findings, the Court affirmed the directed verdict on the ground that there was no evidence showing damage to the plaintiff proximately resulting from the defendants' conduct. Id. at 897.

[T]he problem of more critical import, and which we see as controlling in this case, is whether the trial court was correct in ruling that the plaintiff's evidence failed to establish a cause of action because it showed no damage to the plaintiff proximately resulting from [the attorney's] conduct.

A finding of such damages cannot properly be based on speculation or conjecture. They can be awarded only if there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that the plaintiff suffered injury and damage and also that it was proximately caused by the negligence of the defendant.

Id. at 896 (footnotes omitted). In other words, assuming there was no attorney negligence, it nevertheless would have been pure conjecture for a jury to guess at whether

the Utah court would have granted the plaintiff custody of her children, particularly when she voluntarily sent the children to live with their father in Florida.

This is precisely the question presented in this appeal. Even if this Court assumes that Attorneys had a duty to question their client's veracity, discover the falsity of his schedules and the fraudulent nature of his pre-petition and post-petition conduct, and assuming they persuaded Harline to amend his schedules, what evidence did Harline produce in opposition to Attorneys' motion that the bankruptcy court would have ruled in Harline's favor? The answer is none. To hold that this issue was ripe for submission to a jury would simply allow a jury to guess at what the bankruptcy court might have done. Such guesswork does not amount to the kind of evidence "upon which reasonable minds acting fairly thereon could believe with reasonable certainty." Id.

For the plain reason that a reasonable juror could not conclude that an amendment to Harline's admittedly fraudulent schedules would have changed the bankruptcy court's mind about Harline's entitlement to a discharge in bankruptcy, this Court should rehear the matter and affirm the trial court's order of summary judgment.

B. HARLINE'S FAILURE OF PROOF ON DUTY AND BREACH IS FATAL TO HIS CLAIMS.

It is undisputed that Harline failed to provide the trial court with any evidence, expert or not, in support of his claims that Attorneys had certain duties to Harline and that they breached those duties. It is also undisputed that as a matter of law, expert testimony is required to prove these essential elements of Harline's claims. In just such

a situation, this Court affirmed a summary judgment because plaintiff failed to come forward with expert testimony. In Robinson, supra, this Court agreed with an appellate court in Illinois and stated,

Where, however, the record indicates that plaintiff has [had] every opportunity to establish his case and has failed to demonstrate that he could show negligent acts or omissions . . . [on the part of the] defendant by expert medical testimony, where the issue is clearly one which cannot be determined by laymen alone, summary judgment could be allowed.

740 P.2d at 267, quoting Chiero v. Chicago Osteopathic Hosp., 392 N.E.2d 203, 211 (Ill. App. 1979).

Here, this Court refused to consider Attorney's "expert witness" argument on appeal because it was arguably raised for the first time. Such a ruling misapprehends the fundamental premise and theory underlying Attorneys' motion. Harline did not come forward with any evidence to support the duty and breach elements essential to his claim. As this Court has held, no evidence, other than expert testimony, would satisfy Harline's legal obligations to come forward with admissible evidence in support of his duty and breach claims. Thus, Harline's failure to come forward with expert testimony evidence is fatal to his claims.

To hold that Attorneys are barred from arguing this fatal omission in Harline's case because they did not say the word "expert" in front of the trial court places form over substance. Harline came forward with no evidence on these issues, let alone expert evidence. The real question is whether Harline was deprived of an opportunity to defeat

Attorneys' summary judgment motion because Attorneys did not educate him as to the quality of evidence Harline needed to present on the standard of care elements. He was not prejudiced. Harline was put on notice that he had to come forward with admissible evidence supporting each of the essential elements of his claim. The burden was then on Harline to determine what kind of evidence he should come forward with to establish material issues of fact. He came forward with none. Therefore, this Court may appropriately affirm the trial court because Harline failed to come forward with evidence supporting his standard of care elements.

Finally, that Harline was on notice of his legal obligation to come forward with expert testimony is established by the fact that he had retained an expert bankruptcy attorney to appear as a witness. That he chose not to use Mr. Saperstein by submitting an affidavit or other form of expert opinion in opposition to Attorneys' motion was Harline's election. The only "newness" to Attorneys' argument on appeal is the characterization of the evidence with which Harline failed to come forward in any event.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court grant their Petition for Rehearing, and affirm the trial court's grant of summary judgment.

DATED this 10th day of June, 1993.

Respectfully submitted,



Thomas L. Kay
Mark O. Morris
Attorneys for Defendant-Appellees

CERTIFICATION OF COUNSEL

We certify that the foregoing PETITION FOR REHEARING is filed in good faith and not for the purpose of delay.

DATED this 10th day of June, 1993.



Thomas L. Kay
Mark O. Morris

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, two copies of the foregoing Petition for Rehearing, postage prepaid, on this the 10th day of June, 1993, to:

Paul N. Cotro-Manes, Esq.
4537 Tanglewood Drive
Salt Lake City, UT 84111



COVER SHEET

CASE TITLE:

Exhibit "A"

Wesley G. Harline,
Plaintiff and Appellant,

v.

Case No. 920113-CA

Ronald C. Barker and Larry Whyte,
Defendants and Appellees.

May 27, 1993. OPINION (For Publication).

Opinion of the Court by JUDITH M. BILLINGS, Presiding
Judge; REGNAL W. GARFF and PAMELA T. GREENWOOD, Judges,
concur.

CERTIFICATE OF MAILING

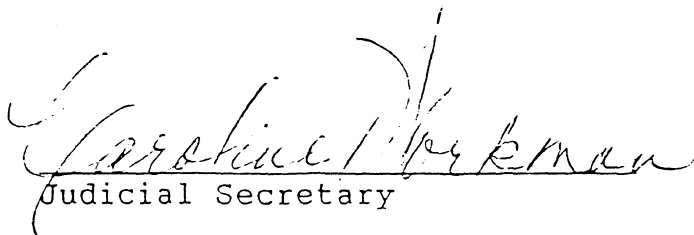
I hereby certify that on the 27th day of May, 1993, a true
and correct copy of the foregoing OPINION was deposited in the
United States mail to the parties listed below:

Paul N. Cotro-Manes (Argued)
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and a true and correct copy of the foregoing OPINION was deposited
in the United States mail to the district court judge listed below:

Honorable James S. Sawaya
Third District Court Judge
240 East 400 South, Room 501
Salt Lake City, UT 84111


Judicial Secretary

TRIAL COURT:

Third District, Salt Lake County #900906529 CV

This opinion is subject to revision before
publication in the Pacific Reporter.

MAY 27 1993

IN THE UTAH COURT OF APPEALS

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Mary T. Noonan
Clerk of the Court

Wesley G. Harline,)	OPINION
)	(For Publication)
Plaintiff and Appellant,)	
)	
v.)	Case No. 920113-CA
)	
Ronald C. Barker and Larry)	
Whyte,)	F I L E D
)	(May 27, 1993)
Defendants and Appellees.)	

Third District, Salt Lake County
The Honorable James S. Sawaya

Attorneys: Paul N. Cotro-Manes, Las Vegas, Nevada, for Appellant
Pro Se
Thomas L. Kay and Mark O. Morris, Salt Lake City, for
Appellees

Before Judges Billings, Garff, and Greenwood.

BILLINGS, Presiding Judge:

Dr. Wesley Harline appeals the trial court's grant of summary judgment in his legal malpractice action against Ronald Barker and Larry Whyte (defendants). He also appeals the court's refusal to compel defendants to respond to interrogatories. We reverse and remand.

FACTS

We recite the facts in the light most favorable to Harline, against whom the summary judgment was entered. See Swift Stop, Inc. v. Wight, 845 P.2d 250, 250 (Utah App. 1992). In February 1986, Harline filed a Chapter 11 bankruptcy petition with the U.S. Bankruptcy Court for the District of Utah. Prior to filing for bankruptcy, Harline made several gratuitous property transfers to family members. He did not identify these transfers when filing his bankruptcy schedules. Harline also did not include an account he had with Merrill Lynch. Additionally, his bankruptcy schedules failed to note his interest in a profit-

sharing plan. Harline received funds from his Merrill Lynch account after his petition was filed. He used these funds for personal expenses without court approval.

On October 29, 1986, after Harline's bankruptcy had been converted to a Chapter 7 proceeding, the bankruptcy court ordered Harline to amend his bankruptcy schedules by November 18, 1986. On November 14, 1986, Bettie Marsh filed a motion to withdraw as counsel for Harline. For purposes of this appeal, defendants concede they represented Harline sometime before November 14, 1986, during the period Harline's bankruptcy schedules should have been amended. Harline never told defendants of any deficiencies in his schedules or of an amendment deadline. Defendants never inquired about outstanding court orders, nor did they consult with former counsel, Bettie Marsh, about the status of Harline's bankruptcy proceedings. In fact, defendants did not look at the docket sheet of Harline's bankruptcy proceedings until the fall of 1987. Thus, defendants were not aware of the court's order to amend Harline's schedules. As a consequence, defendants filed no amendments to Harline's deficient bankruptcy schedules nor did they advise Harline to amend his schedules.

On August 10, 1988, the bankruptcy court denied Harline's discharge in bankruptcy. The court identified Harline's prefiling gratuitous property transfers, his interest in and use of funds from the Merrill Lynch account, his failure to document his property transactions in his schedules, and his failure to disclose the profit-sharing plan, as the basis for denying the discharge.

On July 10, 1989, Paul Cotro-Manes entered his appearance as Harline's counsel in Harline's bankruptcy proceedings. On April 26, 1990, Harline filed amended bankruptcy schedules which identified his interest in his profit-sharing plan. The bankruptcy court allowed Harline to amend the schedules to include this plan. Harline claimed his interest in this profit-sharing plan should be exempt from creditors. The bankruptcy trustee sued to secure Harline's interest in the profit-sharing plan as an asset of the bankruptcy estate.

On November 9, 1990, the bankruptcy court ruled the money in the profit-sharing plan was not exempt and should be available to Harline's creditors. The U.S. District Court for the District of Utah affirmed the bankruptcy court's decision. The Tenth Circuit reversed and remanded the case, holding the exempt status of Harline's interest in his profit-sharing plan was dependent on unresolved legal and factual issues. In re Harline, 950 F.2d 669, 676 (10th Cir. 1991), cert. denied sub nom. Gladwell v. Harline, ___ U.S. ___, 112 S. Ct. 2991 (1992).

Based on these facts, defendants filed a motion for summary judgment. In the motion defendants claimed (1) they did not breach their duties as attorneys, and (2) they were not the cause of the court's refusal to grant Harline a discharge. The trial court granted summary judgment.

Harline appeals claiming material factual issues exist. Harline argues defendants breached their duty in representing him and that defendants' breach caused the court to deny his discharge.¹

STANDARD OF REVIEW

"In reviewing the grant of a motion for summary judgment, we review the facts in the light most favorable to the losing party, while giving no deference to the trial court's legal conclusions." Swift Stop, 845 P.2d at 252. "Summary judgment is appropriate if the pleadings and all other submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Atkinson v. IHC Hospitals, Inc., 798 P.2d 733, 734 (Utah 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 970 (1991) (quoting Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980)); see also Utah R. Civ. P. 56(c).

I. LEGAL MALPRACTICE

The elements of legal malpractice include: (1) an attorney-client relationship; (2) a duty of the attorney to the client; (3) a breach of that duty; and (4) damages suffered by the client proximately caused by the attorney's breach of duty. Williams v. Barber, 765 P.2d 887, 889 (Utah 1988). See also Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah App. 1990). To avoid summary judgment, Harline must establish some competent evidence to support each element of his legal malpractice claim. See

1. In addition, Harline claims there is a factual issue as to whether defendants represented him during the time the schedules should have been amended. Defendants concede they represented Harline during this time for purposes of this appeal. Thus, this factual issue is eliminated.

Furthermore, Harline claims defendants failed to amend his schedules such that his profit-sharing plan could be considered and found exempt. This claim has no merit. The bankruptcy court subsequently allowed the schedules to be amended and the profit-sharing issue was considered on the merits.

Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 267 (Utah App. 1987).

A. Breach of Duty

Defendants claim they had no duty to amend Harline's bankruptcy schedules under the undisputed facts before the trial court. They argue because Harline originally filed false schedules and did not make them aware of the deficiencies in his schedules nor of the court's order requiring amendment that they had no duty to either amend the schedules or advise Harline to amend the schedules.² Harline counters that defendants breached their duty to him by failing to investigate the status of his schedules and the need to amend them.

Once an attorney-client relationship is established, the attorney's duty is to "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake." Williams, 765 P.2d at 889 (quoting Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961), cert. denied, 368 U.S. 987, 82 S. Ct. 603 (1962)). We must decide whether, on the facts before the court, defendants breached this duty of care owed to Harline.³

2. Defendants for the first time on appeal claim summary judgment was appropriate because Harline failed to produce expert testimony that defendants had breached their standard of care. Wycalis v. Guardian Title, 780 P.2d 821, 826 n.8 (Utah App. 1989), cert. denied, 789 P.2d 33 (1990) (acknowledging expert testimony must ordinarily be presented to establish standard of care in cases dealing with duties owed by a particular profession); see also Brown v. Small, 825 P.2d 1209, 1212 (Mont. 1992) (holding expert testimony is ordinarily required in legal malpractice cases to establish the standard of care). We refuse to consider this issue for the first time on appeal because Harline was never given the opportunity to respond to this issue before the trial court, nor was the trial court given the opportunity to consider it. See State v. Marshall, 791 P.2d 880, 887 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990).

3. Defendants argue this case poses a duty question rather than a breach of duty question. Defendants frame the issue as "Did attorneys have a duty to amend the schedules?" We disagree. Duty is a broader question. The duty of defendants was to represent Harline with "competence and diligence." The question is whether they breached that duty by failing to amend the schedules.

Ordinarily, whether a defendant has breached the required standard of care is a question of fact for the jury. Consequently, a motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the nonmoving party, would entitle him to a judgment as a matter of law. A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard.

Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982) (citations and footnote omitted).

In Jackson, the Utah Supreme Court reversed and remanded a summary judgment in favor of an attorney in a legal malpractice action. Id. In that case, the client retained the attorney to prevent a foreclosure sale of her home. At the attorney's suggestion, the client obtained \$400 to be used in settling the creditor's \$800 judgment. Several days before the sale the client took the \$400 to the attorney's office. The attorney told the client the opposing attorney had agreed to stop the foreclosure sale in exchange for the \$400. The attorney did nothing further to prevent the foreclosure. The court held there was a genuine issue of material fact as to whether the attorney's conduct amounted to a breach of the standard of care. Id.

In an earlier legal malpractice case, Young v. Bridwell, 437 P.2d 686 (Utah 1968), clients sued their attorney for failing to advise the clients of their right to appeal after the trial court had ruled against them. The Utah Supreme Court held that if it was established the trial court had ruled in a manner

manifestly against the general law on the subject . . . and this fact was discoverable upon reasonable professional research by counsel, upon such a showing a duty conceivably might arise on the part of counsel at least to so inform his client However, in this case there is no such established error giving rise to the duty of counsel to advise his client of the right to appeal. Counsel is required to possess the ordinary legal knowledge and skill common to members of his profession, but is not required to know all of the law, nor to second guess the trial judge.

Id. at 690. Thus, counsel is required to undertake the research which a reasonable attorney under the circumstances would do.

Id. Accord Williams, 765 P.2d at 889.

In another setting the supreme court has recognized an attorney can rely on the factual representations of his client. In Milliner v. Elmer Fox and Co., 529 P.2d 806 (Utah 1974), stock purchasers sued the seller's accountant and attorneys to recover the loss of value of the stock. The court dismissed the purchasers' complaint holding they could not recover from the attorneys absent a showing of acts or omissions on the part of the attorneys which amounted to a breach of duty.

In the usual case an attorney acts upon the information furnished by his client, in carrying out his work. As a general rule, an attorney is not required to investigate the truth or falsity of facts and information furnished by his client, and his failure to do so would not be negligence on his part unless facts and circumstances of the particular legal problem would indicate otherwise or his employment would require his investigation.

Id. at 808. Thus, absent special circumstances indicating otherwise, attorneys can rely on their client's representations.

We now examine the facts before the trial court on summary judgment to determine if the court correctly decided that no reasonable fact finder could conclude defendants had breached their duties to Harline. Harline knew of the deficiencies in his schedules and also knew of the order to amend. However, he did not inform defendants of these facts. Defendants did not inquire of their client or prior counsel, nor review the record of the bankruptcy proceedings to determine if there were outstanding court orders which needed attention. Based upon these facts, we conclude that a reasonable juror could find that not doing any investigation shows a lack of diligence and competence on the part of defendants.

The investigation required in this setting falls under the rule discussed in Milliner. In Milliner, the court said attorneys can rely on the truth of their clients' statements without investigation and not be negligent, unless the circumstances dictate otherwise. Here the circumstances of the recent change of counsel could lead a reasonable fact finder to determine that subsequent counsel should have obtained the docket sheet or met with former counsel to see if there were outstanding orders, or discussed the status of the schedules with their

client. Thus, the court's summary judgment cannot be affirmed on the basis that defendants, as a matter of law, did not breach their duty to Harline.

B. Proximate Cause

Defendants assert that even if reasonable minds could differ as to whether they breached their duty to Harline, their breach did not cause him harm. They contend Harline caused his own damage by filing false schedules at the inception of the bankruptcy proceedings.

Proximate cause is an issue of fact. Swift Stop, Inc. v. Wight, 845 P.2d 250, 253. Thus, only if there is no evidence upon which a reasonable jury could infer causation, is summary judgment appropriate. Id.

Proximate cause is "[t]hat cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred." Id. (quoting Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992) (quoting State v. Lawson, 688 P.2d 479, 482 n.3 (Utah 1984))). In a legal malpractice action this standard can be distilled to the following: The client must show that if the attorney had adhered to the ordinary standards of professional competence and had done the act he failed to do or not done the act complained about, the client would have benefited. See Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968); Swift Stop, 845 P.2d at 252. Stated another way, "[i]n a legal malpractice action, proximate cause embraces an assessment of the merits of the underlying cause of action."⁴ Williams, 765 P.2d at 889.

In Swift Stop, this court partially reversed and remanded a summary judgment in a legal malpractice action holding there were material issues of fact regarding the proximate cause of the injury. The attorney was sued for legal malpractice based on his representation of the plaintiff in a Chapter 11 bankruptcy proceeding. The plaintiff asserted several claims of malpractice arising from the representation including: (1) the attorney stipulated, without the plaintiff's authorization, that a debt owed to a bank was not dischargeable in the bankruptcy; and (2)

4. Similarly in Young, the court states "in order to make out a cause of action against the attorney for failing to advise [the clients] of their right to appeal, it would have to be shown that there was at least a reasonable likelihood of reversing the judgment" and that it would have benefited the clients. Young, 437 P.2d at 689.

the plaintiff instructed the attorney to propose a 100% repayment plan and the attorney failed to do so.

This court affirmed the trial court's grant of summary judgment on the first issue concluding that the plaintiff failed to show the attorney's stipulation caused the plaintiff harm. We concluded the administrative debt was not dischargeable in bankruptcy thus, the stipulation caused no harm. Therefore, even if the attorney had not done the act complained of the plaintiff would not have prevailed. However, we determined there were material issues of fact as to whether the failure to submit the 100% repayment plan caused harm to the plaintiff. We therefore reversed and remanded on this issue.

Further, in Dunn v. McKay, Burton, McMurray, & Thurman, 584 P.2d 894 (Utah 1978), the court found the plaintiff's own actions caused her loss. The plaintiff appealed a directed verdict in favor of her attorney in a malpractice action based on her divorce. The client sued for loss of custody of her children and the cost of legal counsel in Florida. She claimed the attorney failed to mail the summons properly and therefore failed to obtain service over her former husband, a resident of Florida. The court held the loss of custody and the need for retained legal counsel in Florida would have occurred even if the summons had been properly mailed. The court concluded it was the plaintiff's own actions in sending the children to stay with their father in Florida that caused her loss. Thus, the actions of the attorney did not cause her damages.

We must decide whether a reasonable juror could conclude that if defendants had advised Harline to amend his deficient schedules and assisted him in doing so, the bankruptcy court would have granted his discharge. If no reasonable juror could conclude an amendment to the schedules would have helped Harline avoid the denial of his discharge, then summary judgment was appropriate.⁵

5. Defendants argue equitable estoppel bars Harline from claiming they caused him harm. The elements of equitable estoppel are:

(i)[A] statement, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict

(continued...)

The bankruptcy court based its denial of discharge on section 727(a)(2) and (4) of the Bankruptcy Code which provides:

The court shall grant the debtor discharge, unless

. . . .
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of the property under this title, has transferred, . . . or has permitted to be transferred . . .

(A) property of the debtor, within one year before the date of filing of the petition; or

(B) property of the estate after the date of filing of the petition;

. . . .
(4) the debtor knowingly or fraudulently, in or in connection with the case:

(A) made a false oath or account.

. . . .

U.S.C.A. § 727(a) (1980).

The bankruptcy court found the following prefiling, gratuitous property transfers violated section 727(a)(2)(A): Harline's December 18, 1984 transfer of an Olympus Heights property to family members without consideration; a January 3, 1985 transfer of an Ogden condominium project property to family members without consideration; a January 5, 1985 transfer of Lambs Canyon property to family members without consideration; a

5. (...continued)

or repudiate such statement, act, or failure to act.

Ceco Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969-70 (Utah 1989) (citations omitted). Defendants claim Harline's knowledge of the deficient schedules and his lack of communication of those deficiencies constitute a failure to act and the defendants reasonably relied on that inaction.

Equitable estoppel as a matter of law is not present. Even though Harline may have failed to act by not telling his attorneys about the order to amend, we cannot say as a matter of law that it was reasonable for defendants not to independently review the bankruptcy file. Thus, we cannot say that defendants' reliance upon Harline's omission was reasonable as a matter of law.

January 3, 1985 transfer of an Iowa Street property to family members without consideration.

The court further found Harline violated section 727(a)(2)(B) when he sold his stocks held in a Merrill Lynch account and then used in excess of \$38,000 of the proceeds for his personal benefit. Additionally, the court found Harline had violated section 727(a)(4)(A) by filing a false oath when he did not properly document the above transfers in his schedules. Finally, the court found he had filed false schedules under section 727(a)(4)(A) by listing an incorrect address and failing to disclose an interest in a partnership.

Ruling from the bench on the section 727(a) violations the bankruptcy judge stated:

Intent can be inferred from the circumstances. A Court may look to all of the surrounding facts and circumstances and a continuing pattern of wrongful behavior is one indicator of fraudulent intent. Similarly, reckless indifference to the truth is an indication of fraudulent intent under § 727[(a)](2). The fact that valuable property has been gratuitously transferred raises a presumption that such transfer was accompanied by the actual fraudulent intent necessary to bar a discharge under § 727[(a)](2). With these facts that I found and with these principles of law in mind, I conclude as follows. Wesley G. Harline signed the statement of affairs and schedules under oath and he knowingly misstated the place of his residence which was contrary to the testimony at trial. He knowingly misstated the fact he had owned no partnership interest within six years. That he made no transfers within one year of filing and he knowingly misstated his then ownership of \$38,000 interest in the Merrill Lynch account.

Wesley G. Harline made a false oath when he signed the statement of affairs, when he signed the oath to schedules A and B and this oath was made knowingly and fraudulently.

My findings as to intent to hinder, delay or defraud creditors and knowing and fraudulent false oath are made because of the significant number of wrongful acts and the

reckless indifference to the truth showed by Wesley G. Harline.

The sheer weight of the evidence gives rise to the inescapable conclusion that Wesley G. Harline acted knowingly and with the intent to avoid paying creditors with the intent to conceal property or to place property beyond the reach of creditors.
(Emphasis added).

The question we must focus upon is if defendants had persuaded Harline to amend his schedules to include the prefiling, gratuitous transfers, the Merrill Lynch account, the partnership interest, and correctly state his address, a reasonable juror could conclude the court would have allowed the discharge.

Certainly an amendment would have removed the section 727(a)(4)(A) ground for denial of discharge as the schedules would no longer be false. However, the more difficult question is whether an amendment would allow a reasonable juror to conclude the judge would have changed his section 727(a)(2)(A) and (B) fraudulent property transfer basis for denial of discharge. The bankruptcy court judge stated his delay and defraud findings under section 727(a)(2)(A) and (B) are "because of the significant number of wrongful acts and the reckless indifference to the truth." If Harline had amended the schedules thereby disclosing his questionable dealings, the bankruptcy court judge might have come to a different conclusion regarding Harline's intent to defraud. Thus, we cannot say a reasonable juror could not conclude that Harline may have been granted a discharge had the schedules been amended. We therefore cannot say that the court's summary judgment was proper.

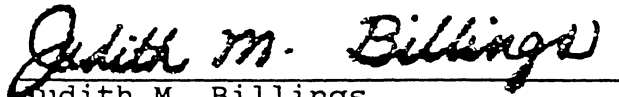
II. MOTION TO COMPEL DISCOVERY

Harline made a motion to compel and overrule objections to answer certain interrogatories involving the designation of witnesses at trial. The trial court denied the motion on July 1, 1991. The basis for the denial of the motion is unclear. Because the motion may well have been denied based on the pending summary judgment motion, we remand the issue for reconsideration.

CONCLUSION

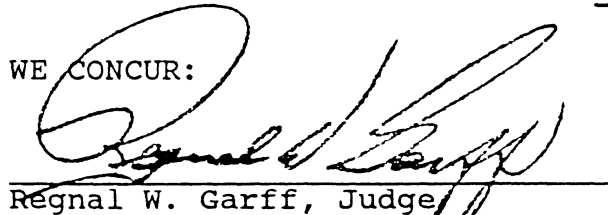
The summary judgment must be reversed because a reasonable juror could conclude that had defendants amended or advised Harline to amend his deficient schedules the bankruptcy court

would have granted his discharge. Further, because we cannot determine the basis for the court's denial of the motion to compel, we remand the issue for reconsideration in light of our reversal of the summary judgment.

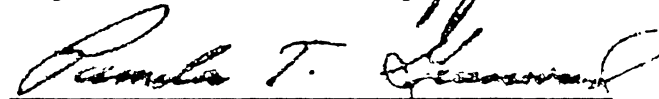


Judith M. Billings,
Presiding Judge

WE CONCUR: -----



Regnal W. Garff, Judge



Pamela T. Greenwood, Judge