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An Award of Fees May Prohibit A Legal Malpractice Complaint

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On September 20, 2022, the Illinois Appellate Court upheld a circuit court’s dismissal of a legal malpractice claim based on the doctrine of *res judicata*.

The legal malpractice dispute arose from Plaintiff, Michael K. Nutter’s (“Nutter”) dissolution of marriage proceeding. *Nutter v. Schiller, DuCanto & Fleck, LLP*, 2022 IL App (2d) 210376, ¶ 4. In 2017, Nutter retained the law firm of Schiller, DuCanto & Fleck, LLP (“SDF”) to represent him in his divorce. *Id.* The circuit court entered an order dissolving Nutter’s marriage in February 2019. The order required each party to pay for their own attorney’s fees. *Id.* In June 2020, the Appellate Court affirmed the dissolution of marriage order. One month later, SDF moved to withdraw from the divorce proceeding and Timothy E. Weiler subsequently appeared as Nutter’s new attorney. *Id.*, ¶ 5.

In August 28, 2020, SDF filed a petition to set the final fees and costs they incurred in representing Nutter. SDF asked for \$92,198.84 in fees and costs. *Id.*, ¶ 6. The circuit court set a hearing on the fee petition for November 2020. *Id.*

Sometime in October 2020, Nutter hired the Gooch Law Firm (“Gooch”) to represent him in a legal malpractice action against SDF. *Id.*, ¶ 8. On October 28, 2020 – 19 days before the scheduled fee petition hearing, Gooch filed a motion to continue the fee petition hearing and asked that the motion be heard just four and a half hours before the fee petition hearing. *Id.* On November 10, 2020, SDF responded to Gooch’s motion for a continuation and argued that the motion was filed in bad faith and was merely an unfair stalling tactic. On the same day, Gooch filed a complaint for legal malpractice against SDF. The complaint alleged various acts of negligence by SDF. *Id.*

Gooch then filed a reply in support of its motion to continue, arguing that the fee petition and the legal malpractice matters were not severable due to the common issues of fact under Illinois Supreme Court Rule 232(b). *Id.*, ¶ 9. At no time did Nutter or his attorneys file a response to SDF’s fee petition. *Id.*

On November 16, 2020, the trial court denied Gooch’s motion to continue and granted SDF’s petition for fees in its entirety. Nutter never appealed the denial of the motion to continue or the order awarding SDF’s fees and costs.

On December 18, 2020, SDF moved to dismiss Nutter’s legal malpractice claim arguing that the suit was barred by the doctrine of *res judicata*. SDF argued that *res judicata* barred Nutter from “bringing the action because (1) the legal malpractice case and the fee petition concerned the same parties, (2) the order awarding defendants fees and costs was final, and (3) the fee petition and malpractice action involved the same legal services.” In response, Nutter argued that the doctrine was inapplicable because he had a right to a jury trial in the legal malpractice action and no such right in the marriage dissolution proceedings. Thus, application of *res judicata* would deprive him of his right to a jury trial. *Id.*, ¶ 11.

The trial court granted SDF’s motion to dismiss after Nutter acknowledged that Illinois rules would have allowed the cases to be consolidated or tried together or bifurcated. The trial court further observed that Nutter “essentially sat on his hands, ‘pinning all hopes on the motion for continuance based on the recent filing of this [legal malpractice] case...’” *Id.*, ¶ 12.

On appeal, Nutter argued that the trial court erred because there was neither a final judgment nor identity of the cause of action between the two cases. *Id.*, ¶ 17. The Appellate Court disagreed.

First, the Appellate Court held that an order granting a fee petition is final. *Id.*, ¶ 19. Second, the Appellate Court stated that the record was insufficient to determine if there was an identity of the cause of action in the two cases. Nevertheless, the Court concluded the lack of evidence was fatal to Nutter’s appeal because it was Nutter’s obligation to present a record sufficient to allow review. *Id.*, ¶ 20. Because Nutter did not include a transcript (or acceptable substitute) from either the hearing on the fee petition or the hearing on the motion to dismiss Nutter’s legal malpractice action, the court could not determine if the lower court erred and thus affirmed the circuit court’s order.

Nutter v. Schiller, DuCanto & Fleck, LLP, 2022 IL App (2d) 210376

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