

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0372

September Term, 2015

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RUSSELL R. MIRABILE

v.

TROY CHRISTOPHER SWANSON, et al.

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Krauser, C.J.,  
Berger,  
Moylan, Charles E., Jr.  
(Retired, Specially Assigned),

JJ.

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Opinion by Moylan, J.

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Filed: March 29, 2016

This appeal stems, ultimately, from an attorney fee dispute between Russell R. Mirabile, the *pro se* appellant, and his former attorney, Troy Christopher Swanson, Esq., and Mr. Swanson's law firm (collectively, "the appellees"). The dispute eventually took the form of a complaint filed by the appellant in the Circuit Court for Harford County on October 25, 2011. On November 18, 2014, following a series of intervening orders in a related Baltimore County case, the appellees filed a motion for summary judgment on the basis of collateral estoppel. The appellant conceded that the claims of his initial complaint were "no longer viable," and in a motion for appropriate relief filed on February 5, 2015, he requested: (1) a postponement of the trial date in order to assess possible alternative claims and (2) leave to file an amended complaint based on that assessment. On April 10, 2015, the Circuit Court for Harford County granted the appellees' motion for summary judgment and denied the appellant's request for relief. The appellant presents a single issue for review, which we have rephrased as follows:

Did the trial court abuse its discretion by denying the appellant's request for leave to file an amended complaint?<sup>1</sup>

We find no error, and shall affirm.

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<sup>1</sup>The question was presented in appellant's brief as follows:

"Whether the trial court erred as a matter of law when it denied the appellant's Motion to File Supplemental Pleadings and Exhibits and his Motion for Appropriate Relief?"

### **Factual and Procedural Background**

The relationship between the parties began on November 3, 2010, when the appellant retained the appellees to represent him in a partnership dissolution suit that had languished in the Circuit Court for Baltimore County since August 26, 2008 (hereafter, "the Baltimore County case"). By December 13, 2010, the appellees successfully negotiated a \$1.5 million settlement agreement which entitled the appellant to an immediate cash payment of \$60,000.

By April of 2011, the appellant became unhappy with the terms of the settlement agreement and discharged the appellees. He retained new counsel, Ms. Mercedes Samborsky, Esq., who, on April 29, 2011, filed a motion to vacate the settlement agreement. That motion was denied by the Circuit Court for Baltimore County following a hearing on August 4, 2011. The same day, the appellees served the appellant with notice of an attorney's lien against the settlement proceeds in the amount of \$48,142.76. The appellant responded on August 17, 2011, by filing a "Notice Disputing Attorney's Lien and Request for Adjudication of Rights," claiming that the appellees had failed to provide him with monthly billing statements as required under the retainer agreement and that the lien amount was unjustified. On September 15, 2011, the appellant also requested an *en banc* review of the court's decision to enforce the settlement agreement.

Subsequently, on October 25, 2011, while the parties' lien dispute and appellant's request for *en banc* review were still pending in Baltimore County, the appellant initiated the present action by filing a two-count complaint in the Circuit Court for Harford County

(hereafter, "the Harford County case"). The first count of the complaint was for breach of contract based on appellees' failure to provide monthly billing statements. The complaint asserted that this failure prevented appellant from knowing when, or if, the retainer had been exhausted, and further, that had he known the retainer was exhausted he would have sought alternative counsel with lower fees "that he could afford." In terms of relief, the appellant requested that the Circuit Court for Harford County "find that [appellant] owes nothing to [appellees]." The second count, styled "breach of fiduciary duty," set forth a litany of professional ethics violations flowing from the appellees' failure to provide monthly billing statements, for which the appellant sought compensatory and punitive damages totaling \$1.3 million.

On December 5, 2011, the appellees filed a motion to stay proceedings in the Harford County case, asserting that the claims raised in the appellant's complaint were directly tied to the ongoing lien dispute in Baltimore County. The Circuit Court for Harford County agreed, and by order dated March 12, 2012, imposed a stay in the Harford County case. In a memorandum opinion accompanying the order, the court stated:

"It is somewhat difficult to say at this time that all of the issues raised in each of these cases are identical. *It is extremely likely*, however, that if the disposition in the open portions of the Baltimore County case, i.e., the [*e*]n banc review and the action on the attorneys' lien, is in favor of [the appellees], *all or a portion of the claims in the present case may also be resolved under the legal principles of res judicata and/or collateral estoppel*. While it should

be clear that this court is not making such a ruling at this time, the possibility that it might occur makes it appropriate to stay any action in this case."

(Emphasis added).

The Harford County case then lay dormant for over two and a half years. Meanwhile, the Baltimore County case forged steadily ahead. On August 14, 2012, an *en banc* panel of the Circuit Court for Baltimore County affirmed that court's August 4, 2011 decision to enforce the settlement agreement. The lien dispute was subsequently adjudicated over the course of a two-day trial on August 15 - 16, 2012. The trial judge delivered her ruling from the bench at the end of the second day and concluded with the following statements:

*"I conclude that the services rendered by [the appellees] were necessary. They were reasonably performed. The amounts sought minus the deductions I've discussed were fair and reasonable.<sup>121</sup> ... Mr. Mirabile has been again, well-represented by counsel in this case. Ms. Samborsky and Ms. Etsy have presented the testimony and arguments that Mr. Mirabile wanted to have presented. They have simply not been persuasive to the Court."*

(Emphasis added).

The in-court ruling was followed by a written order dated August 22, 2012, in which the Circuit Court for Baltimore County declared that the appellees held a valid and enforceable attorney's lien against the settlement proceeds. The appellant appealed from the order on September 13, 2012. That appeal was subsequently dismissed by this Court.

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<sup>2</sup> The trial judge reduced the amount of the lien from \$48,142.76 to \$43,200.76.

On October 27, 2014, the appellees moved to lift the stay in the Harford County case,<sup>3</sup> followed shortly thereafter by a motion for summary judgment filed on November 18, 2014. The thrust of the summary judgment motion was that the appellant's claims were barred by collateral estoppel due to the resolution of the lien dispute in the appellees' favor. On December 3, 2014, the appellant filed a *pro se* opposition to the summary judgment motion, along with a "Motion to File Supplemental Pleadings and Exhibits." In his motion, the appellant advised the trial court that Ms. Samborsky, his attorney, had passed away earlier that year and that he was in the process of seeking new counsel.<sup>4</sup> In terms of relief, the motion requested that the court allow new counsel additional time to file "supplemental pleadings." The appellant eventually retained new counsel on January 20, 2015.

On February 5, 2015, the appellant filed, through counsel: (1) a supplement to his *pro se* opposition to summary judgment, and (2) a motion for appropriate relief. In his supplemental opposition the appellant conceded that the claims of his October 25, 2011 complaint were "no longer viable." However, in his motion for appropriate relief, he asserted that he "*may* have claims for legal malpractice." (Emphasis added). The motion requested that the court "allow him to file an Amended Complaint with causes of action different from

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<sup>3</sup>The record is unclear as to the exact date the stay was lifted. The court's order lifting the stay was dated November 27, 2014, and filed December 2, 2014. In their briefs, both parties refer to November 14, 2014, as the date the stay was lifted.

<sup>4</sup>Ms. Samborsky passed away approximately eleven months earlier, on January 31, 2014.

those in his original Complaint," and that the trial date – then scheduled for April 27, 2015 – "be continued to a date to be determined after the filing of his Amended Complaint so that he has time to develop his claims." The appellees opposed the motion for appropriate relief.

On March 30, 2015, a hearing was held on (1) the appellees' motion for summary judgment, (2) the appellant's motion for appropriate relief, and (3) the appellant's motion to file supplemental pleadings and exhibits. At the hearing, the summary judgment motion was not contested. The disagreement focused instead on whether the appellant should be allowed additional time to develop a potential legal malpractice claim to serve as the basis for an amended complaint. On April 10, 2015, the court issued its written decision granting the appellees' motion for summary judgment and denying both of appellant's motions. With respect to its denial of the appellant's motion for appropriate relief, the court's decision began as follows:

*"It is the opinion of this court that it is not in the interest of justice as well as prejudicial to the Defendants to allow the Plaintiff free reign to develop and submit a completely new complaint a little more than one month before trial. Although the Plaintiff believes that he 'may have claims for legal malpractice and breach of contract ... against Defendants for their deficient representation of Mirabile in the [Baltimore County] case,' it is clear from the Plaintiff's pleading that these are only 'potential' claims, and their validity has not yet been assessed."*

(Emphasis added).

The court went on to highlight the considerable amount of time that the case had been pending and described what it saw as the prejudice that would result to the appellees if appellant's motion were granted:

*"The instant case was filed almost three and a half years ago. As noted by the Defendants, this court specifically told Mr. Mirabile on November 14, 2014, that the trial in this case would not be continued solely because he retained new counsel. Moreover, the Plaintiff had approximately one year from the death of Ms. Samborsky to retain new counsel and amend his complaint, and he failed to do so. Allowing Mr. Mirabile to do so now just weeks before trial would be extremely prejudicial to the Defendants, and would result in additional cost, discovery, and preparation necessary to defend against new facts and theories. One example of this is presented by the fact that Mr. Mirabile's deposition has already occurred. Because the 'potential' claims raised by Mr. Mirabile's counsel such as 'breach of the contractual duty to provide competent legal advice and representation' are not directly related to the Plaintiff's original claims, the court cannot expect the Defendants to proceed without additional discovery on those theoretical new claims. As a result, this case will be delayed even further, most likely stretching into its fourth year. While the Plaintiff's latest attorney is new to the case, Mr. Mirabile and his prior attorney have had more than sufficient time to evaluate all possible claims that they might theoretically have against the Defendants and have [ ] simply failed to do so. As such, this court will deny the Plaintiff's Motion for Appropriate Relief."*

(Emphasis added).

The court denied appellant's "Motion to File Supplemental Pleadings and Exhibits" as moot in light of its rulings on the motion for appropriate relief and the motion for summary judgment. This appeal followed.



### **Discussion**

The appellant contends that the circuit court erred in denying his Motion for Appropriate Relief and his Motion to File Supplemental Pleadings and Exhibits. Those motions, taken together, amounted to a request for leave to file an amended complaint. This Court reviews a trial court's rulings on such requests for abuse of discretion, as the Court of Appeals made clear in *Schmerling v. Injured Workers' Insurance Fund*, 368 Md. 434, 444, 795 A.2d 715, 720 (2002):

"With respect to procedural issues, a trial court's rulings are given great deference. The determination to allow amendments to pleadings or to grant leave to amend pleadings is within the sound discretion of the trial judge. Only upon a clear abuse of discretion will a trial court's rulings in this arena be overturned."

(Internal citations omitted).

The appellant's argument, which spans less than three full pages of his brief, precedes from the foundational premise that "amendments should be liberally allowed so that cases are decided on their merits." He then submits that a multi-year stay of his case, culminating with the grant of appellees' motion for summary judgment without leave to amend, "is not a trial on the merits." Therefore, he seems to conclude, the circuit court erred by denying his motions. The argument is completely unavailing.

The appellant is correct that, as a general rule, amendments to pleadings should "be freely allowed when justice so permits." Maryland Rule 2-341(c). The appellant is also correct that the rationale for this approach extends from the legal maxim that cases should

"be tried on their merits rather than upon the niceties of pleading." *See Crowe v. Houseworth*, 272 Md. 481, 485, 325 A.2d 592, 595 (1974) (citation omitted).

What the appellant fails to appreciate, however, is that the policy favoring the liberal grant of leave to amend by no means operates as an unqualified right to amend a pleading at any time and in any way. For instance, the legal calculus is more intricate where, as here, the proposed amendment involves the addition of a new (theoretical) cause of action shortly before the trial date in a case which has been pending for over two and a half years. Under such circumstances, it is appropriate, if not necessary, for the trial court to consider additional factors such as whether granting the request for leave to amend would result in undue delay or prejudice to the opposing party. *RRC Northeast, LCC. v. BAA Maryland, Inc.*, 413 Md. 638, 673-74, 994 A.2d 430, 452 (2010).

The appellant's failure to acknowledge these countervailing considerations may stem from his apparent belief that his proposed amendments did not constitute a new cause of action or alter the operative factual pattern. *See* Appellant's Brief at 3. Such a belief, however, is belied by the motion for appropriate relief itself, which expressly requested that the trial court "allow [appellant] to file an Amended Complaint *with causes of action different than those in his original Complaint.*" (Emphasis added). Moreover, at the March 30, 2015 hearing, counsel for the appellant described the anticipated difference between the original complaint and the proposed amended complaint as follows:

"There was no analysis of whether there was either a legal malpractice claim against the defendants or breach of contract claim as to the duty to provide competent legal advice and representation. Just the fairness and reasonableness of the bill.

"During the stay of the case of almost two and half years, *the fairness and reasonableness of the attorneys fees was extensively litigated* in the Baltimore County [case]. And so my conclusion was that that aspect, that claim, as to the fairness and reasonableness of the bill was exhaustively litigated and really barred by collateral estoppel at this point. However, *that doesn't mean that Mr. Mirabile may not have claims for legal malpractice and for breach of contract, not the fairness and reasonableness of the bill, but whether the defendants at all provided competent legal advice and representation.*"

(Emphasis added).

The proposed amended complaint was clearly presented to the trial court as introducing a new cause of action based upon distinct operative facts. It was therefore entirely appropriate for the trial court to consider the factors of undue delay and prejudice to the appellees in ruling on the appellant's request. In other words, the appellant was not, as his brief would suggest, entitled to the requested relief as a matter of right.

With respect to the issue of undue delay, the trial court began by noting that the bases for the appellant's proposed amended complaint were more theoretical than actual. That determination is directly supported by the appellant's own characterization as set forth in his motion for appropriate relief:

"[Appellant] has an expert on real estate litigation ready to assess his *potential claims for legal malpractice and breach of contract*. However, that

assessment cannot be performed until [Appellant] has a complete file from the [Baltimore County case], in particular, the trial transcripts."

(Emphasis added).

The motion further indicated that the appellant "needs time to assess his claims and file an Amended Complaint based on that assessment," and that a postponement of the trial would be necessary "so that he has time to develop his claims, including discovery." Finally, at the March 30, 2015 hearing, appellant's counsel stated:

"[T]he reason we haven't offered facts is because we haven't been able to assess the claim yet. *It may be that we would determine that there isn't a viable legal malpractice claim but from what I have heard, there may be.* We need to thoroughly review the record and I need to do it and our expert needs to do it. This takes time."

(Emphasis added).

The appellant was, in effect if not in fact, asking the court to postpone the trial date indefinitely and grant him leave to file an amended complaint based upon a new cause of action that even he was not certain he would be able to raise. That is the epitome of undue delay.

The trial court also noted the amount of time that the case had been stayed as informing its determination that the appellant could, and should, have assessed any potential claims he may have had against the appellees during that period. The court initially imposed the stay on March 12, 2012. From that point, the appellant was on notice that it was "extremely likely" that an unfavorable outcome of the lien dispute in the Baltimore County

case would bar his claims in the Harford County case.<sup>5</sup> However, there is no indication in the record that the appellant endeavored to investigate or develop any alternative claims, such as a legal malpractice claim, prior to the stay being lifted in November of 2014 – over two and a half years later.

In his brief, the appellant attempts to explain this apparent lack of diligence by suggesting that the imposition of the stay not only suspended all proceedings in the case, but also prevented him from filing any motions or pleadings, such as an amended complaint. This explanation, however, would only account for why he may have waited until the stay was lifted to *file* an amended complaint; it does not explain why he refrained from even investigating potential claims upon which to base such a complaint. To be sure, the death of appellant's attorney during the pendency of the case is a relevant consideration. However, as the trial court noted, at the time of Ms. Samborsky's death the case had already been stayed for just shy of two years, and the appellant did not retain a new attorney until almost a year after that. We are presented with no reason to disagree with the trial court that this was "more than sufficient time to evaluate all possible claims."

The trial court also found that granting the appellant's motion would result in prejudice to the appellees. On this point the court noted that a grant of the appellant's request to submit a new complaint based on a predominantly theoretical cause of action shortly

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<sup>5</sup>The trial court articulated this "extremely likely" possibility as its basis for imposing the stay in the first place.

before trial would "result in additional cost, discovery, and preparation necessary to defend against new facts and theories," and likely stretch the case "into its fourth year."

We hold that because the circuit court found that granting the appellant's request for leave to file an amended complaint was not in the interests of justice and would result in undue delay as well as prejudice to the opposing party, it did not abuse its discretion by denying the appellant's motions.<sup>6</sup>

**JUDGMENTS OF THE CIRCUIT  
COURT FOR HARFORD COUNTY  
AFFIRMED.**

**COSTS TO BE PAID BY THE  
APPELLANT.**

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<sup>6</sup>In a single paragraph toward the end of his brief, the appellant asserts that his potential legal malpractice claim would not have been barred by the applicable statute of limitations. The appellees set forth an extensive response to this assertion in their own brief. However, although appellees did raise the issue of the statute of limitations at the March 30, 2015 hearing, the trial court did not base any portion of its decision upon the availability or unavailability of such a defense. As such, and because the trial court's ruling was otherwise adequately supported for the reasons stated in its written decision, we need not address that tertiary issue.