

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0026

September Term, 2014

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RALPH T. BYRD,

v.

MELVIN G. BERGMAN

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Krauser, C.J.,  
Zarnoch,  
Reed,

JJ.

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Opinion by Reed, J.

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Filed: August 5, 2015

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from appellant Ralph T. Byrd’s legal malpractice action against appellee, Melvin I. Bergman. The Circuit Court for Prince George’s County granted appellee’s motion for summary judgment and denied appellant’s motion for partial summary judgment.

Appellant timely appealed that decision<sup>1</sup> and presents four questions for our review, which we have rephrased and condensed into one question:

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<sup>1</sup> Appellee presented the following questions, as originally stated:

I. Did Material Issues Of Fact Preclude A Finding By The Circuit Court That Defendant Did, In Fact, Recognize The Perjury Charges At The Judicial Hearing, But Exercised Defendant’s Professional Judgment To Not Challenge The Perjury Charges At The Judicial Hearing, And, Instead, Challenge The Perjury Findings At The Disposition Hearing?

II. If Material Issues Of Fact Did Not Preclude A Finding By The Circuit Court That Defendant Did, In Fact, Recognize The Perjury Charges At The Judicial Hearing, But Exercised Defendant’s Professional Judgment To Not Challenge The Perjury Charges At The Judicial Hearing, And, Instead, Challenge The Perjury Findings At The Disposition Hearing, Did Defendant Negligently Exercise Such Professional Judgment By Failing To Satisfy His Duty Under MRPC 1.0(f) And MRPC 1.4(a)1 To Obtain Plaintiff’s Prerequisite Informed Consent To Such Course Of Action?

III. Was The Record Sufficiently Developed To Enable The Circuit Court To Grant Summary Judgment For Defendant Without Requiring Expert Testimony As To The Relevant Standard Of Care?

IV. Did the Circuit Court Err When It Granted Summary Judgment For Defendant Despite Material Issues Of Fact Relative To Whether Defendant Satisfied A Duty To Question The Court Of Appeals’ Impartiality?

Did the trial court err as a matter of law when it determined that appellee failed to show an action for legal malpractice where it found no material issues of fact existed?

For the following reasons, we answer this question in the negative and affirm the circuit court’s judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The current appeal arises from a legal malpractice claim against appellee, who represented appellant before the Attorney Grievance Commission relating to allegations that appellant filed false reports in violation of bankruptcy laws and relating to the mishandling of a number of client matters. The federal bankruptcy court found that appellant engaged in conduct deemed “in bad faith,” “dilatory” and “frivolous,” “designed to frustrate the judicial process,” and “reek[ing] of flagrant abuse.” After the Attorney Grievance Committee was notified of this conduct, it brought three complaints against appellant. Appellee represented appellant in the proceedings. The Court of Appeals referred the petition to the Honorable Ronald B. Rubin of the Circuit Court for Montgomery County, for an evidentiary hearing and to make findings of facts. The complaints, which related to appellant’s filing of false reports with the bankruptcy court and his representations of former debtor defendant clients were found to be supported by clear and convincing evidence by Judge Rubin. The Court of Appeals sanctioned appellant with disbarment for his conduct in violation of the Maryland Rules of Professional Conduct.

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Appellant initially filed suit against appellee in the United States District Court for Maryland Southern Division, which dismissed for lack of jurisdiction and noted that the complaint appeared to be “frivolous and vexatious” and directed appellant to “show cause as to why sanctions . . . should not be imposed for vexatiousness, malfeasance, bad faith, or the like.” Appellant failed to appear for the Show Cause hearing and was fined \$15,000. He then failed to show to three subsequent hearings and also failed to pay the \$15,000 fine within the required time, and thus, after dismissing the federal claim against the appellee, the federal court concluded that the appellant should be charged with criminal contempt in a separate proceeding.<sup>2</sup>

Appellant then filed the instant complaint at issue on November 21, 2012, alleging the following:

- Appellee failed to recognize or defend the perjury charges brought against appellant;
- Appellee failed to fully disclose to appellant, appellee’s past relationship with a law firm that filed the complaint relating to appellant’s representation of a former client;
- Appellee failed to interview and call relevant witnesses;
- Appellee failed to challenge or raise the issue of impartiality in the disciplinary proceedings;
- Appellee failed to object make appropriate objections at trial; and
- Appellee failed to prepare properly for oral argument.

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<sup>2</sup> See Record Extract of Appellant at E64-E77. The status of this separate matter is unclear from the record; its disposition, however, is of no moment to our decision in this case.

Appellee moved to dismiss the case, alleging that appellant failed to state a claim. In a subsequent filing, appellee incorporated documents outside of the pleadings, and thus converted the motion into a motion for summary judgment. The circuit court issued an opinion on November 4, 2013, and held that “[appellee] did in fact recognize the perjury charges against [] [appellant] arising from his filings with the bankruptcy court.” Furthermore, the circuit court explained that during arguments before the Court of Appeals, the Commission stated that, although it “did not specifically allege perjury, [it] rather simply outlined the particular facts that would have supported such a claim.” The circuit court also found that appellee did attempt to refute the allegations of perjury against appellant based on the transcript of the proceedings. Finally, the circuit court concluded that appellant’s bald allegations did not raise a genuine issue of material fact and thus granted appellee’s motion for summary judgment and denied appellant’s motion for partial summary judgment.

We shall include additional facts as necessary to our discussion.

## **DISCUSSION**

### **A. Parties’ Contentions**

Appellant contends that the circuit court erred when it granted summary judgment in favor of appellee despite the existence of material facts in dispute. Appellant argues that the material fact at issue is whether appellee was aware of the perjury charges and whether appellee failed to defend him on that charge.

### **B. Standard of Review**

“[T]he proper standard for reviewing the granting of a summary judgment motion should be whether the trial court was legally correct.” *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 592 (1990). “The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” Rule 2-501(f). Thus, “[i]n determining whether the trial court correctly entered summary judgment as a matter of law, we apply a *de novo* standard.” *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 634 (2009) (citing *Conaway v. Deane*, 401 Md. 219, 243 (2007)). “Where there is no genuine dispute of material fact . . . we proceed to review determinations of law.” *Id.*

Maryland courts have defined a “material fact” as “a fact the resolution of which will somehow affect the outcome of the case.” *Faulkner v. Am. Cas. Co. of Reading, Pa.*, 85 Md. App. 595, 614 (1991); *King v. Bankerd*, 303 Md. 98, 111 (1985). “We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party.” *Suder v. Whiteford, Taylor & Preston, LLP*, 413 Md. 230, 239 (2010) (citation and internal quotation marks omitted).

### **C. Analysis**

“To prevail on a claim for legal malpractice, a former client must prove (1) the attorney’s employment, (2) the attorney’s neglect of a reasonable duty, and (3) the loss to

the client proximately caused by that neglect of duty.” *Id.* at 239. As the Court of Appeals explained:

In a lawyer-negligence or fiduciary-breach action brought by one who was the plaintiff in a former and unsuccessful civil action, the plaintiff usually seeks to recover as damages the damages that would have been recovered in the previous action or the additional amount that would have been recovered but for the defendant’s misconduct. To do so, the plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer’s misconduct, the plaintiff would have obtained a more favorable judgment in the previous action. The plaintiff must thus prevail in a “trial within a trial.” All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff’s former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial. . . .

*Id.* at 241-42 (citation omitted).

Maryland Rule 2-501(a) provides that a motion for summary judgment may not be granted unless the court concludes that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

Here, the circuit court concluded that appellee did in fact recognize the perjury charges against appellant. During oral arguments in his disciplinary proceedings before the Court of Appeals, appellee argued that “there was no mention of criminal conduct. One of the disciplinary rules that bar counsel alleges violation of criminal conduct by an attorney, but if you read the gist in the petition, there was nowhere that bar counsel mentioned in the body of the petition that they believed that the conduct of the respondent, [appellant], was criminal. . . . what you had was a series, a factual series, of allegations and

then a set of these are the possible disciplinary rules that have been violated, one of them being 8.4(b). . . . There is no specification that 8.4(b) in the petition was directly aimed at any particular aspect of this. . . . The petition certainly I do not believe raised it.”

Assistant Bar Counsel Fletcher P. Thompson responded on behalf of the Commission and agreed that the petition did not specifically mention the statute relating to perjury, but that it had alleged facts which supported the perjury allegation. The circuit court noted that the petition expressly alleged that “Respondent’s filings [with bankruptcy court] were false and Respondent made them with knowledge of their falsity.” (quoting *Attorney Grievance Committee of Maryland v. Byrd*, 408 Md. 449, 480 (2009)). Appellee addressed the issue in his oral argument by refuting the allegations and referred to Federal Bankruptcy Judge Thomas J. Catliota’s findings that appellant was cited only for civil, not criminal, contempt during appellant’s original bankruptcy proceedings. Appellee continued to argue that appellant’s action did not arise to criminal contempt, and that Judge Catliota never addressed the false statements related to appellant’s bankruptcy proceedings.

In its opinion, the Court of Appeals explained that the Commission requested appellant be disbarred for his many rule violations, with the “most significant” being violations of MRPC 8.4(b) and (c).<sup>3</sup> As the circuit court explained, the perjury charge was

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<sup>3</sup> MRPC 8.4 provides:

It is professional misconduct for a lawyer to:

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not the sole reason for appellee’s disbarment. We agree with the circuit court that as part of appellee’s professional judgment, he was well within reason to focus more on Judge Catliota’s findings than Judge Rubin’s findings. Appellee was therefore aware of the false statements relating to the perjury charge, and refuted the allegations.

We, therefore, agree with the circuit court that appellant failed to show that there was a dispute as to any material fact and that appellant’s claims are insufficient to show that appellee’s trial tactics was the proximate cause of his disbarment. *Fishow v. Simpson*, 55 Md. App. 312, 322, 462 A.2d 540, 546 (1983) (“Counsel’s trial tactics are not a basis for a malpractice action.” (citation omitted)). Thus, the moving party was not entitled to judgment as a matter of law.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE’S COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**

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...continued

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]