

**87-LW-1033 (5th)**

Sue CARPENTER, Executor of the Estate of Joseph Levering, et al., Plaintiffs-Appellants,

v.

Robert W. LEVERING, et al., Defendants-Appellees.

No. 86-CA-19.

5th District Court of Appeals of Ohio, Knox County.

Decided on April 17, 1987.

Civil Appeal from the Court of Common Pleas, Case No. 84 CI 673.

James A. Calhoun, Calhoun, Benzin, Kademenos & Heichel, Mansfield, for plaintiffs-appellants.

John M. Alton, Lane, Alton & Horst, Columbus, Robert L. Rauzi, Zerkowitz, Barry & Cullers, Mount Vernon, Joseph W. Ryan, Porter, Wright, Morris & Arthur, Columbus, for defendants-appellees.

Donald W. Conley, Columbus, pro se.

OPINION

WISE, Judge.

Plaintiffs-appellants, Sue Carpenter, Donald Carpenter and Ronald K. Carpenter (appellants), appeal the judgment of the Court of Common Pleas of Knox County dismissing their action against defendants-appellees, Robert W. Levering (defendant Levering), Western Surety Co. (Western Surety), Donald W. Conley (Conley), and Lawrence E. Winkfield (Winkfield). Appellants raise the following three assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT AGAINST THE DEFENDANT-APPELLEES, ROBERT W. LEVERING, DONALD W. CONLEY, LAWRENCE E. WINKFIELD AND WESTERN SURETY COMPANY ON THE GROUNDS OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT AGAINST THE DEFENDANTS-APPELLEES, ROBERT W. LEVERING, DONALD W. CONLEY, LAWRENCE E. WINKFIELD AND WESTERN SURETY COMPANY, ON THE DEFENSE OF RES JUDICATA.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT AGAINST THE DEFENDANTS-APPELLEES, ROBERT W. LEVERING, LAWRENCE E. WINKFIELD AND WESTERN SURETY COMPANY ON THE DEFENSE OF LACK OF JURISDICTION OVER THE SUBJECT MATTER.

All three of appellants' assignments of error essentially go to one alleged error in the trial court. All three assignments of error allege that the trial court erred in dismissing appellants' complaint. Each of the assignments of error simply addresses a different reason why the trial court erred. Accordingly, we will treat all three assignments of error as one.

This appeal is governed by Civ.R. 12(B)(6). The trial court dismissed appellants' complaint for failure to state a claim upon which relief can be granted. In order to do so, it must appear beyond a doubt from the complaint that the plaintiff

can prove no set of facts entitling him to recovery. O'Brien v. University Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242; and see Conley v. Gibson (1957), 355 U.S. 41. Furthermore, in construing a complaint upon a motion to dismiss for failure to state a claim, we must also take the material allegations of the complaint as being admitted. State, ex rel. Alford v. Willoughby Civil Serv. Comm. (1979), 58 Ohio St.2d 221, 223. Very few complaints fail to meet the liberal standards of the civil rules. All that the civil rules require is a short, plain statement of the claim that will give the defendant his notice of a plaintiff's claim and the ground upon which it is based. Moreover, the motion to dismiss is viewed with disfavor and should rarely be granted. An action should not be dismissed merely because the court doubts the plaintiff will prevail. Whether the plaintiff can prevail is a matter properly determined by the proof and not the pleadings. Slife v. Kundtz Properties, Inc. (1974), 40 Ohio App.2d 179, 182.

Applying these standards, we note that in count four of appellants' complaint they allege that the defendants Winkfield and Conley committed legal malpractice in not bringing suit against defendant Levering as requested. Appellants allege that defendant Levering committed malpractice as the attorney for the estate of Joseph Levering. Their complaint against Conley and Winkfield states a claim upon which relief can be granted. Perhaps they will not be able to prove their case and may lose it at a later time, but it is not ripe for dismissal at this point. The trial court has jurisdiction over legal malpractice claims. The Probate Court did not adjudicate legal malpractice claims against defendant Levering, although it did make findings regarding his competency. The issues raised in this malpractice claim are not res judicata, having not been determined by the Probate Court.

Count three of appellants' complaint alleges that "Defendant, Levering, acting as Executor, breached his fiduciary duty to said estate by his negligent, wanton and reckless administration of said estate." This count also refers to the estate of Joseph Levering, it does not allege any legal malpractice on the part of defendant Levering, however it does allege a breach of a duty to the estate by the executor. This matter is, as the trial court determined, a matter for the probate court which has already been decided. Accordingly, this issue is res judicata, having been decided previously by the Probate Court.

Count two of the complaint alleges that the Western Surety Co. contracted to indemnify the Estate of Marjorie L. Hoffman against any loss caused by the malfeasance of defendant Levering. Appellants allege that Western Surety Co. is liable to Sue Carpenter, the executor, for damages as a result of defendant Levering's negligent, wanton and reckless administration of the estate.

However, this issue is also res judicata as determined by the trial court. On June 16, 1982, the Probate Court of Knox County, Ohio, in Case No. 24252, in the Estate of Margorie L. Hoffman, signed and filed an "Entry Approving and Settling Account." The final judgment rendered by the probate court is not subject to collateral attack and it has been held that R.C. 2109.35 provides a firm basis for the application of the doctrine of res judicata in such cases. See Hill v. Savings Deposit Bank & Trust Co. (1968), 37 O.L.A. 267, 47 N.E.2d 674.

The first count of appellants' complaint alleges that:

Defendant, Levering, acting as Administrator W.W.A., breached his fiduciary duty to said estate by his negligent, wanton and reckless administration of said estate.

Appellants' complaint here also refers to the Estate of Marjorie L. Hoffman.

As pointed out above, the issues raised by this count in the complaint are res judicata due to the determination made previously by the probate court. Therefore, appellants' complaint as it relates to count one does not state a claim upon which relief can be granted.

Accordingly, we sustain appellants' assignments of error only to the extent that they relate to the legal malpractice claim against Winkfield and Conley. We overrule appellants' assignments of error to the extent that they refer to defendant Levering and the Western Surety Co. Therefore, we reverse in part and affirm in part the judgment of the Court of Common Pleas of Knox County, and remand this case for further proceedings in accordance with this opinion.

PUTMAN, P.J., and MILLIGAN, J., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed in part and reversed in part. The trial court's judgment dismissing appellants' complaint against both defendant Levering and Western Surety Co. is hereby affirmed. However, the trial court's judgment dismissing appellants' complaint in regards to defendants Winkfield and Conley is hereby reversed. This cause is remanded to that court for further proceedings in accordance with law.

NORMAN J. PUTMAN, P.J.

JOHN R. MILLIGAN, J.

EARLE E. WISE, J.