

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
CIVIL TRIAL DIVISION

JESUS HERNANDEZ

v.

DAVID S. RUDENSTEIN, ESQUIRE

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SEPTEMBER TERM, 2001

NO. 3060

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Myrna Field, A.J.

April 2, 2002

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**OPINION OF THE COURT**

Plaintiff, Jesus Hernandez, appeals from this court's order dated January 22, 2002, sustaining defendant's preliminary objections to his complaint. For the reasons which follow, plaintiff's complaint in this legal malpractice action was properly dismissed and this court's order should be affirmed.

Plaintiff brought this suit alleging professional negligence by defendant, David S. Rudenstein, Esquire, who was appointed to represent him at trial in a criminal matter. The background on this case is as follows. Defendant, David S. Rudenstein, Esquire, was appointed to represent the plaintiff herein in a criminal matter. In that case, Commonwealth v. Hernandez, CCP Phila. 96-06-0255, plaintiff was charged with various drug offenses. Mr. Rudenstein tried Mr. Hernandez's case to a jury before the Honorable Genece Brinkley. On January 16, 1998, the jury found Mr. Hernandez guilty on all counts. On March 12, 1998, Judge Brinkley sentenced him to three to six years incarceration.

On March 20, 1998, Mr. Rudenstein filed a notice of appeal with the Superior Court. Additionally, on September 8, 1998, he filed a statement of matters complained of on appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. Subsequently, pursuant to the order of the trial court and upon the wishes of Mr. Hernandez, Mr. Rudenstein filed a petition to withdraw as counsel. The petition was granted on July 6, 2001, and on July 31, 2001, new counsel entered an appearance before the Superior Court on Mr. Hernandez's behalf.

On September 25, 2001, Mr. Hernandez commenced this action against Mr. Rudenstein alleging professional negligence. In response to the complaint, Mr. Rudenstein filed preliminary objections in the form of a demurrer, asserting that Mr. Hernandez failed to state a claim upon which relief could be granted. This court agreed and, by order dated January 22, 2002, sustained Mr. Rudenstein's preliminary objections and dismissed Mr. Hernandez's complaint.

The criteria for a legal malpractice action have been specifically set forth by the Pennsylvania Supreme Court in Bailey v. Tucker, et al, 533 Pa. 237, 621 A.2d 108 (1993). Under Bailey, in order to sustain a malpractice action against a criminal defense attorney, the plaintiff must establish five elements: 1) the employment of the attorney; 2) reckless or wanton disregard of the criminal defendant's interest by the attorney; 3) that "but for" the attorney's conduct the plaintiff (criminal defendant) would have obtained an acquittal or complete dismissal of the charges; 4) the existence of damages; and that 5) the plaintiff (criminal defendant) has pursued post-trial remedies and obtained relief which was dependent on attorney error. 533 Pa., at 250-51, 621 A.2d, at 115. The court explained that the burden on a plaintiff in a criminal malpractice action is higher than in the civil context because, among other reasons, a criminal

defendant has many opportunities to allege ineffective assistance of counsel or to otherwise attack his conviction.

In the instant matter, Mr. Hernandez's direct appeal is still pending before the Superior Court. Commonwealth v. Hernandez, 1042 PHL 1998. Additionally, he has yet to avail himself of any possible remedies under the Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546. Moreover, his complaint fails to allege facts sufficient to establish the elements set forth in Bailey. Thus, Mr. Rudenstein's demurrer was properly sustained.

For all of the above reasons, this court's order of January 22, 2002, sustaining defendant's preliminary objections and dismissing plaintiff's complaint, was proper and should be affirmed.

By the Court:

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Myrna Field, A.J.