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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-452 / 89-1797

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NICOLE HELLER, ANDREA HELLER, MATTHEW HELLER, and MARK HELLER, by their Next Friend NICOLE HELLER,

Plaintiffs-Appellants/Cross-Appellees,

vs.

DANIEL HELLER, Individually and in his Capacity as Executor and Trustee of the Estate of John Heller, Deceased, and as Conservator of the Estate of Nicole Heller, Andrea Heller, Matthew Heller and Mark Heller,
Defendant-Appellee,

and

KENNETH SOJKA,
Defendant-Appellee/Cross-Appellant,

and

GRANT McMARTIN,
Defendant-Appellee.

Appeal from the Iowa District Court for Shelby County, Glen M. McGee, Judge.

Plaintiffs appeal a district court order dismissing their action against Daniel Heller and Grant McMartin and determining Ken Sojka was negligent as attorney for plaintiffs but they were not damaged by his conduct.

AFFIRMED.

Stephen A. Rubes and David E. Richter, Council Bluffs, and James R. Welsh of Welsh & Sibbernsen, Omaha, Nebraska, for appellants.

Robert Kohorst of Kohorst Law Firm, Harlan, for appellee Daniel Heller.

Milton A. Katskee of Katskee & Henatsch, Omaha, Nebraska, and David F. McCann of Dippel & McCann, Council Bluffs, for appellee Kenneth Sojka.

Thomas J. Anderson of McMartin & Anderson, Harlan, for appellee Grant McMartin.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

John Heller died in an auto accident in September 1984. He left four minor children, the plaintiffs in this case. John's ex-wife, Mary, also survived his death.

At his death John owned a farm encumbered by several notes and mortgages signed by both John and Mary. John's personal property was also heavily encumbered. John's will left his farm in trust to the children, together with his half of the homestead.

John had a $100,000 life insurance policy payable to his children upon his death. This policy had a double indemnity provision in case of accidental death. The $200,000 policy proceeds are the subject of the litigation here.

Daniel Heller was appointed executor and trustee pursuant to the terms of John's will. He later was named conservator of the children. Apparently Dan also farmed the land after his brother's death. Ken Sojka was the attorney for Daniel in these proceedings. Grant McMartin was appointed guardian ad litem for the minor children.

After the estate was open, Sojka presented a plan to Mary and Dan. The plan involved the use of the life insurance proceeds to pay off the estate's debts. Sojka and Dan apparently felt this was necessary to save the farm from foreclosure.

However, there was a problem with the plan. The children were the beneficiaries of the insurance policy.

They were not liable for the debts incurred by their father prior to his death. It was possible the insurance proceeds could not have been reached by the estate's creditors. The children then would have a large cash deposit in an interest bearing account to enable them to pay for college or establish themselves in business.

Sojka sent notice of the plan to McMartin, the guardian ad litem for the children. McMartin reviewed the plan and filed a pro forma answer with the court. The pro forma answer had been made out by Sojka beforehand and sent to McMartin with the other papers. The children now argue McMartin failed to perform his duties as guardian ad litem, acting instead as a rubber stamp for Sojka.

Sojka prepared an application in the estate and conservatorship outlining the plan. When he presented the plan to the district court sitting in probate, Sojka informed the district court judge there was no objection to this plan. Relying on this representation, the court approved the plan.

In September 1988 plaintiffs filed an amended petition at law. The premise of their action was defendants wrongfully used the insurance proceeds to pay estate debts. Plaintiffs claimed use of the insurance proceeds was neither prudent nor in the best interests of the children, resulting in depletion of conservatorship funds. The children argued they were not liable for the debts of the estate. The insurance proceeds were therefore exempt from the claims of the decedent's creditors.

The district court found Sojka negligent in failing to fully inform the court when he presented the application, but it determined plaintiffs were not damaged. The court also dismissed plaintiffs' claims against the remaining defendants, Grant McMartin as guardian ad litem for the children and Daniel Heller as executor and trustee of the estate and conservator for the children.

The plaintiffs have appealed, and Sojka has cross-appealed.

Our review is on assigned errors of law. Iowa R. App. P. 4. Findings of the trial court sitting without a jury have the effect of a special verdict. Id. We are bound by the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Existence of Damages

The children of John Heller contend the trial court erred in finding no damages as a result of the defendants' actions. We look to the record to determine if the trial court's finding is supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The defendants presented expert testimony by James Lohman, a practicing attorney and certified public accountant. Mr. Lohman has extensive practice in estate and probate matters and serves on committees on taxation of both the Iowa Bar Association and the Iowa Society of Public Accountants.

Mr. Lohman testified to the value of the estate with or without the infusion of cash from the insurance proceeds. He testified to the value of the conservatorship if the insurance proceeds had simply been invested in an interest bearing account. Mr. Lohman concluded the value of the present estate with the cash infusion was approximately equivalent to the value of the conservatorship if the proceeds were deposited in an interest-bearing account.

The trial court believed the defendants' expert witness James Lohman to be the more credible on damage to the parties. We determine substantial evidence exists to support the trial court's finding no damage accrued to the children as a result of the payment of the life insurance proceeds to cover the estate debts.

In making our determination, we are mindful, as was the trial court, the children are the beneficiaries both of the conservatorship and the estate trust. By paying off the various estate debts, the children were able to retain possession of the family farm. The farm may have been lost or the conservatorship assets dissipated through protracted litigation by creditors seeking to reach the funds from the insurance policy. We note the creditors had at least color of a claim.

Use of the conservatorship funds in this manner allowed the children to retain their present home. It avoided even more severe disruption in their lives after the untimely death of their father. While there may have been other

alternatives, the infusion of the conservatorship funds into the farm has resulted in no ascertainable harm to the children's interests. In fact, the evidence indicates they may have benefited from this investment.

We affirm the trial court on this issue.

II. Liability of Attorney for the Executor/Trustee/ Conservator

Kenneth Sojka was attorney for Daniel Heller as executor/trustee of the estate and conservator for the children. Sojka did not inform the court of any possible complications or conflicts when he presented the initial application to use the conservatorship funds for the probate court's approval. The trial court in the present action found Sojka liable for any damages due to the use of the insurance proceeds to pay estate debts.

> The Iowa Supreme Court has stated:
>
> Legal malpractice consists of the failure of an attorney "to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." (Citation omitted.) "When such a failure proximately causes damage it gives rise to an action in tort."

Koeller v. Reynolds, 344 N.W.2d 556, 560 (Iowa App. 1983) (citing Millwright, 322 N.W.2d at 32). See also 7A C.J.S. Attorney & Client §§ 254-55 (1980).

We determine the trial court's finding of liability on the part of attorney Sojka to be supported by substantial evidence. The customary practice in Shelby County was for

the moving attorney to inform the court as to any objections or complications when presenting a motion ex parte for the court's approval. The moving attorney would have already contacted other interested parties or their attorneys and obtained their approval. If any party had objections, the moving attorney was to inform the court. The court would then set the matter for a full hearing.

Sojka knew of the possible conflicts in his application. He was taking conservatorship funds and using them to pay estate debts. The conservatorship funds were quite possibly exempt from any claims by the estate's creditors. Sojka had an obligation to inform the trial court of this potential problem. The trial court could then have held a full hearing and made its decision with a complete view of the facts. This litigation could have been avoided, and the parties would have had their answer as to the propriety of the executor/trustee/conservator's actions.

Attorney Sojka should have been more aware and circumspect in dealing with the obvious problems of the conflicting roles played by his client, Dan Heller. The interests of the executor/trustee of the estate were potentially conflicting with the interests of the conservator for the children. Dan Heller occupied all three roles. "[A] client has a right to rely upon the superior skill and knowledge of his attorney." Millwright v. Romer, 322 N.W.2d 30, 34 (Iowa 1982).

Attorney Sojka's obligation was to fully inform his client, Dan Heller, of these potential conflicts. Sojka was obligated to inform the court at the time of the application of any possible objections or complications. There is also evidence Sojka failed to fully inform the mother, Mary, of the full implications of using conservatorship funds to pay off the estate debts.

> A duty to disclose material facts arises ... when it is shown that one of the parties has superior knowledge or a special situation, such as an attorney-client relationship, exists between the parties. When either of these conditions is shown, we have required the party to make a full and truthful disclosure of all material facts within that party's knowledge. Failure to do so is proof of scienter.

Cornell v. Wunschell, 408 N.W.2d 369, 375 (Iowa 1987) (citations omitted).

We determine there is substantial evidence in the record to support the trial court's finding of liability on the part of attorney Sojka. We affirm on this issue.

III. Guardian ad Litem

The children further assert the trial court erred regarding the guardian ad litem, Grant McMartin. The trial court found the guardian ad litem not negligent in his handling of this case.

We determine the trial court erred in the standard it applied to determine McMartin's liability for legal malpractice. The trial court found "Grant McMartin's performance as guardian ad litem met the same standard that

other practicing attorneys in Shelby County follow." This is an incorrect statement of the law. Attorneys, like other professionals, are held to a higher standard than merely the customary or usual practice in a local area.

We reiterate the applicable standard for the state of Iowa, which also applied to attorney Sojka:

> Legal malpractice consists of the failure of an attorney "to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."

Koeller v. Reynolds, 344 N.W.2d at 560.

The record shows McMartin received the application to apply conservatorship funds to the estate's debts. In the same packet he received a previously prepared answer made out by attorney Sojka. All McMartin had to do was sign the previously prepared answer and file it with the court. This was sufficient to give the court jurisdiction over the interests of the children.

Apparently McMartin met with Sojka and discussed the merits of the application. However, our reading of the record and the trial court's findings convinces us McMartin relied almost solely on the representations of Sojka. We find this cursory, pro forma conduct unacceptable. The guardian ad litem is appointed to protect the interests of the children. The reason for the appointment is their interests might well be opposed to those of the estate. To allow the guardian ad litem to rely almost totally on opposing counsel appears to us to be a failure by the

guardian ad litem to fulfill its responsibility to the children.

> Courts generally recognize some malpractice cases may present situations in which the proof is so clear and obvious that a trial court could, with propriety, rule as a matter of law whether the lawyer met applicable standards. (Citations omitted.)
> * * *
> Other cases may arise in which the asserted shortcomings of the lawyer are so plain they may be recognized or inferred from the common knowledge or experience of laymen. (Citations omitted.)
> * * *
> [Under other circumstances], plaintiff was obligated to produce some testimony to show [attorney's] judgment [] was so lacking as to constitute negligence. See Annot., Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 17 A.L.R.3d 1442 (1968) and citations; Note, Standard of Care in Legal Malpractice, 43 Ind. L. J. 771 (1968).

Baker v. Beal, 225 N.W.2d 106, 112-13 (Iowa 1975).

Our problem here is we cannot say with certainty McMartin's actions violated the standard of care for Iowa attorneys acting as guardians ad litem in 1984. The pertinent date for ascertaining the applicable professional standard of care is the date of the incident itself, not the date of the subsequent action alleging a breach of that standard. 7A C.J.S. Attorney & Client § 255 (1980). The appellant children have not pointed out to us, nor have we located, any portion of the record showing the applicable standard of care for guardians ad litem other than the standard for Shelby County.

We determine the appellant children were "obligated to produce some [expert] testimony to show [McMartin's conduct] was so lacking as to constitute negligence." Baker, 225 N.W.2d at 113. The children failed to carry their burden of proof in this respect. Id. Thus, even though the trial court applied an incorrect standard of care, it correctly held under the record McMartin was not negligent. (See Anderson v. Yearous, 249 N.W.2d 855, 863 (Iowa 1977) ("In light of the fact the same result is reached in each instance [by the trial court and the appellate court], an affirmance on [] appeal is mandated."))

We affirm the trial court on this issue.

Other issues have been raised by the parties. We determine these other matters to be either covered by our above ruling or without merit. With the exception of the standard of care applied to guardians ad litem, we affirm the trial court in all respects.

AFFIRMED.

Habhab, J., concurs; Donielson, P.J., specially concurs.

DONIELSON, J. (specially concurring)

I agree with the result reached by the majority. I write separately to emphasize two points. First, if the insurance proceeds at issue had been clearly exempt from creditor claims, the damage question might have been closer, i.e., the plaintiffs would have been able to rely upon their expert's testimony concerning the present value of those funds. However, the insurance proceeds were not clearly exempt from creditor claims: the Federal Land Bank's mortgage on the farm required life insurance as a condition of the mortgage loan; Woodmen Life insurance company questioned paying the proceeds to the children because of some uncertainty as to the named beneficiaries. The exempt status of the insurance proceeds was open to challenge, possible litigation, and the resultant delays and expenses. Under such circumstances, I am not able to evaluate the damage issue in the manner plaintiffs request.

I write also to express my concern with regard to the conflicting interests represented by Daniel Heller. Not only was Daniel Heller appointed executor of his deceased brother's estate, conservator for his brother's children, and trustee of the testimentary trust set up for the children's benefit, he was also farming the land which is at the center of this dispute. While it is not improper that one person represent all these interests, I believe the possible conflicts are apparent in the recitation. District courts should exercise extreme caution in naming

one person to represent so many and potentially diverging interests.