IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

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IMOGENE DESSEL, Executor of the Estate of JAMES J. DESSEL, Deceased)
)
Plaintiff,)
)
vs.)
)
GEORGE DESSEL,)
)
Defendant.)

GEORGE DESSEL,)

Third-Party Plaintiff-Appellee)

vs.)

R. L. DONOHUE,)

Third-Party Defendant-Appellant.)

7-217
86-1098

Appeal from the Iowa District Court for Fayette County (No. 38773), George Stigler, Judge.

Appellant attorney R. L. Donohue appeals from the trial court's determination he had committed malpractice and Appellee George Dessel was damaged thereby. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Frederick G. White, Waterloo, for third-party defendant-appellant.

David M. Elderkin and Edward M. Blando of Elderkin, Pirnie, Von Lackum & Elderkin, Cedar Rapids, for defendant-third-party-plaintiff-appellee.

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowie, Decorah, for plaintiff.

Considered en banc.

SACKETT, J.

This is an appeal by Third-Party Defendant-Appellant R. L. Donohue. Donohue, an attorney, challenges the trial court's determination he had been negligent in the representation of Third-Party Plaintiff-Appellee George Dessel. Donohue contends the trial court erred in awarding George Dessel actual and punitive damages. We reverse and remand.

Decedent James Dessel and George Dessel are brothers. The brothers were partners in a successful furniture store in West Union. In 1979 they decided to dissolve the partnership. James wanted to retire. James and George contacted Donohue who drew a partnership dissolution agreement. The dissolution agreement provided for the sale of James' share of the partnership, except for the accounts receivable, to George. The accounts receivable were to be divided as collected. Neither brother had independent legal representation. James died. His widow Imogene was appointed executor of his estate. She hired Donohue as attorney for the estate. While the estate was being probated a dispute arose between Imogene, James' executor, and George about the collection and division of the accounts receivable.

Donohue counselled both George and Imogene during the dispute. The parties ultimately reached an impasse. Donohue, acting for the estate, then sued George. The suit claimed George breached his fiduciary duties in the collection of the accounts. George hired other counsel to represent him. A year and a half after the original action was filed George filed a third-party action against Donohue. George claimed Donohue committed legal malpractice in the representation of him. Donohue removed himself as attorney for James' estate. The case was tried to the court. The court dismissed the estate's petition against George. No appeal has been taken by the estate. The court found for

George on his claim against Donohue and awarded him $47,258 compensatory and $20,000 punitive damages. Donohue appeals. We reverse and remand.

Initially we determine as did the trial court Donohue had conflicting interests between George and the estate on the issue of collection of the accounts receivable. Donohue should have removed himself as attorney for both parties on the accounts receivable issue when it became obvious Imogene as executor and George had conflicting positions. Donohue did withdraw immediately when George challenged him on the issue. But the fact there were conflicting interests should have been recognized by Donohue. He should not have had to wait for his client to call it to his attention.

But the inquiry does not end here. In lawyer malpractice cases, a plaintiff must demonstrate:

> 1. The existence of an attorney-client relationship giving rise to a duty;
> 2. that the attorney, either by an act or a failure to act, violated or breached that duty;
> 3. that the attorney's breach of duty proximately caused injury to the client; and
> 4. that the client sustained actual injury, loss, or damage.

Burke v. Roberson, 417 N.W.2d 209, 211 (Iowa 1987). In addition, it is not sufficient merely to prove an attorney-client relationship existed with respect to some matters; it is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). Donohue contends there is not substantial evidence to support the trial court's findings of negligence, proximate cause and damage.

Our review is limited to the correction of legal errors. Iowa R. App. P. 4. The trial court's findings of fact in this case have the effect of a special verdict. See, e.g., Kurtenbach, 260 N.W.2d at 54. If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. E.g., Baker v. Beal, 225 N.W.2d 106, 109 (Iowa 1975).

There allegedly were two agreements between George and James. The first is the written partnership dissolution agreement Donohue drafted. It is a two-page plain language document. It provides, among other things, that George shall buy and James shall sell the assets of the business except the accounts receivable. The second agreement is an oral supplemental agreement George and James allegedly made after the first agreement. The agreement allegedly was made in the store in the presence of George and his wife. Donohue was not asked for legal advice when the alleged oral agreement was made.

Applying the dictates of Kurtenbach, 260 N.W.2d at 56, we determine whether there is substantial evidence to support the elements necessary for George's verdict.

I. Existence of Attorney-Client Relationship

There is substantial evidence of an attorney-client relationship. We reject Donohue's claim to the contrary. See id.

II. Attorney Failed to Act, Violated or Breached A Duty

Attorney F. James Bradley of Cedar Rapids testified for George on the standard of care Donohue owed his client. He testified when the issue of conflict became known Donohue's conduct was inconsistent with the standard of care he owed to his client and he did not conform to the standard of care. There is no other expert evidence in the record that Donohue was negligent.

The trial court determined a violation of the Iowa Code of Professional Responsibility for Lawyers is evidence of negligence. The issue whether violation of the Code of Professional Responsibility is evidence of negligence in an action by a client against his or her attorney has not been directly addressed or decided in Iowa. In Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978), the Iowa court rejected a claim seeking to impose liability on a third party for negligence based on a violation of the Code of Professional Responsibility for Lawyers. See also Bickel v. Mackie, 447 F.Supp. 1376, 1383 (N.D. Iowa 1978); Merritt Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F.Supp. 17, 22 (E.D. Tenn. 1972). The court in Brody, 267 N.W.2d at 907, noted the preliminary statement to the code provides:

> The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

(Emphasis supplied.)

Courts in other jurisdictions that have confronted the issue of whether a breach of a Disciplinary Rule under the Code of Professional Responsibility provides the basis for a private cause of action and have expressly held that a violation of a Disciplinary Rule does not create a private cause of action include: Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F. Supp. 1573 (S.D. Fla. 1987); Bickel v. Mackie, 447 F.Supp. 1376 (N.D. Iowa 1978), aff'd mem., 590 F.2d 341 (8th Cir. 1978); Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So.2d 22, 23 (Ala. 1988); Noble v. Sears, Roebuck & Co., 33 Cal. App.3d 654, 109 Cal.Rptr. 269 (1973); Tingle v. Arnold, Cate, & Allen, 199 S.E.2d 260 (Ga. Ct. App. 1973); Spencer V. Burglass, 337 So.2d 596 (La. Ct. App. 1976), writ denied, 340 So.2d 990 (La. 1977); Brainard v. Brown, 458 N.Y.S.2d 735 (N.Y. App. Div. 1983); Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or. 1981); In re Estate of Pedrick, 482 A.2d 215, 217 (Pa. 1984); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978).

We, however, while noting our displeasure with the dual representation find it unnecessary to determine whether a violation of the code establishes a standard for civil liability because the real issue is whether Donohue's action caused George to be damaged. An ethical violation standing alone does not necessarily mean the attorney's representation of and/or advice to the client was faulty or that it caused the client damage. See Roberts v. Langdale, 363 S.E.2d 591, 593 (Ga. Ct. App. 1987).

III. The Breach Caused Injury And The Client Suffered Damage

> In a legal malpractice action it is not sufficient merely to prove an attorney-client relationship existed with respect to some matters. It is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based. (Citations omitted.)
>
> In determining the scope of the attorney's duty, courts must give effect to the fiduciary role of the attorney and the heavy responsibility this imposes on him to represent and protect the client's interests with respect to the subject matter of the employment. (Citations omitted.) However, the attorney's duty to represent and protect his client does not extend beyond reasonable bounds.

Kurtenbach, 260 N.W.2d at 56-57.

What damages did Donohue cause George? We look first to the partnership dissolution agreement. There was no expert testimony the agreement was negligently drafted. The trial court found, "A reasonable attorney under the circumstances would have better investigated the circumstances and drafted a contract which met the needs of the client." It went on to find Donohue should have included provisions governing what would have happened if one of the partners did not live up to his responsibility and provisions for how money collected on the accounts receivable would be handled. The trial court determined that would have eliminated the problems here, and the failure to include these things constituted a breach of care. The contract was short, drafted in plain English and very understandable. There is not substantial evidence to support the court's finding the contract was negligently drafted.

The second problem with the partnership dissolution agreement was George contended paragraph seven should not have been included. Paragraph seven is again clear and straightforward and provides:

> The buyers upon the purchase of the interest of the sellers do hereby agree to assume all indebtedness of any nature whatsoever which the business presently has and to hold the sellers harmless in connection with same.

George contends paragraph seven should not have been included in the contract and claimed Donohue erred in putting paragraph seven in the agreement. There is no other provision for the handling of accounts payable in the agreement. The court found the parties made a mutual mistake in signing the agreement and paragraph seven was null and void. Because the trial court declared paragraph seven null and void he found against the executor on her claim for money damages based on paragraph seven. George therefore had no contractual liability under paragraph seven. His contractual liability was the same as though the paragraph had been omitted. We do agree with the trial court Donohue should pay George's attorney fees to defend on this issue.

The trial court found there was an oral supplemental agreement providing George should receive a six percent commission. George and his wife testified to the agreement. Donohue was not consulted when the agreement was made. The only evidence of the agreement was the testimony of George and his wife. James' widow contends the oral agreement was not made. The trial court determined the agreement existed. There is evidence to support this conclusion. The evidence also would support a determination by a fact finder no oral supplemental agreement had been made.

The only actual damages awarded against Donohue by the trial court flowed from the supplemental agreement. The trial court determined damages due on the six percent commission were $68,262 and only $47,500 had been paid to George. The trial court held George was entitled to a judgment against Donohue for unpaid commissions in the amount of $20,762 and George was entitled to another $7,606 in commissions George had returned to the estate on Donohue's advice. George never made claim against the estate for either of these amounts.

The question is whether Donohue was negligent in telling George to pay back and not to collect the commissions. There is no expert testimony Donohue breached a standard of care in telling George not to withhold the commissions or to pay them back. A factual dispute existed over whether there was an agreement for commissions. George was operating in a fiduciary capacity in collecting the accounts. It was not erroneous advice to tell George not to withhold the commission absent a determination or clear directive from the widow that she would honor the alleged oral agreement. There is no evidence this was erroneous advice or the advice was faulty because of Donohue's dual representation at the time the advice was given. See Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 655 (Iowa 1979).

We reverse the judgment for compensatory damages.

IV. Punitive Damages

Donohue contends there is insufficient evidence to support the claim for punitive damages. In the absence of malice, punitive damages cannot be awarded. The "malice" required is something less than actual ill will or hatred toward another. Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974). Legal malice may be inferred where defendant's act is illegal or improper; where the nature of the illegal act is such as to negate any inference of feeling toward the person injured, and is in fact inconsistent with a complete indifference on the part of defendant. Id. Liability for exemplary damages is not based upon the maliciousness of the defendant but is based, rather, upon the separate substantive principle that illegal or improper acts ought to be deterred by the exaction from the defendant of sums over and above the actual damage he has caused. See C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy, Inc., 412 N.W.2d 593, 598 (Iowa 1987).

Donohue was an attorney who tried to wear two hats for too long. He should have advised both Imogene and George to obtain separate counsel on the accounts receivable matters. There is no evidence of deceit and no evidence of desire to harm. George was fully aware Donohue was attorney for James' estate. George was a businessman. He managed a successful furniture business. He had had other attorneys at different times. There were obvious benefits to him in settling the matter with his brother's widow.

We do not find the evidence supports a finding of malice either actual or legal. We reverse the punitive damage award.

We remand to the trial court to determine the attorney fees for defending paragraph seven.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

All judges concur except Hayden, J., and Oxberger, C.J., who concur in part and dissent in part.

HAYDEN, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority's conclusions regarding punitive damages and attorney fees, but disagree with its conclusion regarding proof of causation of actual damages. I also disagree with the majority's apparent concern regarding the district court's reliance on violations of the Iowa Code of Professional Responsibility (CPR) to find breach of duty.

The salient facts in this case are as follows. George Dessel and the estate of his brother, James Dessel, became involved in a dispute regarding the collection of the accounts receivable of the brothers' former partnership. The dispute concerned the effect of the collection provisions of the partnership dissolution agreement, drafted by R.L. Donohue, and the effect of the collection provisions of a later oral agreement between George and James. Under the oral agreement George was to receive an additional commission on his collection of these accounts.

In his capacity as partner, George retained the services of Donohue to help with these collections. Donohue's representation commenced before the dispute with the estate arose and continued throughout most of the dispute. However, Donohue also represented the estate, having assured George it would not affect his representation of him. As the dispute with the estate flared, George requested Donohue's advice concerning whether he (George) should continue retaining the commissions on his collections and whether he should turn over to the estate commissions he had already retained. Donohue advised him to discontinue his retention of the commissions and to repay the estate commissions previously retained. George followed this advice, under the misapprehension it had been given in Donohue's capacity as counsel for the partnership, not the estate. Later, Donohue, as representative of the estate, prepared and initiated the suit wherein the estate alleged George was violating fiduciary duties established by the partnership dissolution agreement. In addition, Donohue resolved the estate's executor's questions about the partnership affairs with information he gained from conversations with George.

Ultimately, the district court ruled in George's favor regarding entitlement to the commissions and the majority affirms that ruling to the extent it upholds the validity of the oral agreement. However, by the time the suit was filed against George, he could only assert his claim for commissions as a setoff against the estate's claims against him. See Harper v. Coad, 191 N.W.2d 682, 689 (Iowa 1971). His claim was otherwise barred because more than six months had elapsed from the opening of the estate. See Iowa Code § 633.410.

The majority concludes George did not prove his damages (erroneously foregone and repaid commissions) were proximately caused by Donohue's dual representation. The majority reasons there is no evidence Donohue's advice was faulty because of his dual representation. I disagree. In reliance on Donohue's advice, George took actions relating to the commissions which were inimical to his interests. Unbeknownst to George, this advice was given in Donohue's capacity as counsel for the estate. I conclude the district court's finding of causation for George's damage was amply supported by the evidence.

The majority also implies George did not prove Donohue breached a duty owed him. The majority finds it unnecessary, however, to address this issue because of its ruling regarding causation. As I disagree with this ruling, I shall briefly address Donohue's breach of duty.

The majority seems concerned the district court determined a breach of the CPR provided the basis for this private cause of action. To that end, the majority cites a number of other jurisdictions which deny such a cause of action. I am not convinced, however, the district court placed such potentially undue reliance on a violation of a Disciplinary Rule by Donohue. The trial court determined Donohue breached his fiduciary duties to George, see, e.g., Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639, 654-56 (Iowa 1979), and violated the CPR. The district court concluded, in relation to the violations of the CPR, "the CPR does establish a standard of care in attorney-client relations." Surely the majority does not contest this statement. As noted by our supreme court:

> [Plaintiff] argues that the code sets standards applicable to an attorney's conduct without regard to whether the action before us is brought by the Committee on Professional Ethics and Conduct, Iowa Sup. Ct. R. 118.5-.11, or by a private party.
>
> We agree that the code of professional responsibility sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised.

Cornell v. Wunschel, 408 N.W.2d 369, 377 (Iowa 1987) (emphasis supplied).

If we were to address the issue, I would conclude the district court's finding of breach of duty by Donohue was supported by substantial evidence.

Oxberger, C.J., joins this partial dissent.