

IN THE COURT OF APPEALS OF IOWA

No. 9-296 / 88-1714

FILED

AUG 23 1989

CLERK SUPREME COURT

CAROL KRIDER BEASLEY,

Plaintiff-Appellee,

vs.

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M. WAYNE OLTROGGE,

Defendant-Appellant.

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Appeal from the Iowa District Court for Cerro Gordo  
County, Timothy J. Finn, Judge.

Defendant attorney appeals a judgment awarding  
plaintiff \$6,000 in a legal malpractice action. REVERSED.

Mark R. Schoeller, Clear Lake, for defendant-appellant.

Donald H. Gloe and Linny C. Emrich of Miller, Pearson,  
Gloe, Burns, Beatty & Cowie, Decorah, for  
plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and  
Sackett, JJ.

**SACKETT, J.**

The question we need address is whether there is substantial evidence to support a jury verdict for plaintiff-appellee Carol Krider Beasley in her legal malpractice action against defendant-appellant M. Wayne Oltrogge, an attorney. Plaintiff claims she was damaged as a result of defendant's failure to file an answer in her behalf in a dissolution modification proceeding. We find the record does not contain substantial evidence to support a finding plaintiff suffered damages. We reverse the judgment.

Plaintiff's marriage to Stanley Krider was dissolved in 1980. The decree awarded Krider the marital residence and provided when he no longer occupied the residence it was to be sold and plaintiff was to receive one-half of the net sale proceeds, up to a maximum of \$3700. Plaintiff was granted a lien against the real estate to secure her rights.

In 1986, Krider filed a petition to modify the dissolution decree asking his obligation to share the sale proceeds with plaintiff be eliminated and her lien on the real estate be dissolved.

After plaintiff, then a Tennessee resident, was served with notice of the petition, she telephoned defendant attorney who had represented her in the initial dissolution case. Defendant admittedly agreed to file an answer in

plaintiff's behalf in the modification action but failed to do so. As a result of defendant's failure to file an answer, a default judgment was entered in Krider's behalf modifying the dissolution decree to eliminate any right plaintiff had to share in the proceeds of the sale of the marital residence.

After learning of this default judgment, Carol filed the present legal malpractice action against defendant. A jury awarded plaintiff damages of \$6000.

The plaintiff in an attorney malpractice case 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.

Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988); Burke v. Roberson, 417 N.W.2d 209, 211 (Iowa 1987). Defendant admits there was an attorney-client relationship and he failed to perform a duty in not filing an answer to the petition for modification. He contends plaintiff has not met her burden as to proximate cause and damages. Defendant made a motion for a directed verdict on those grounds, both at the close of plaintiff's evidence and at the close of all the evidence.

The general measure of damages in a legal malpractice case is the amount of loss actually sustained as a

proximate result of the attorney's conduct. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149, 160 (Iowa 1984) (quoting 7A C.J.S. Attorney & Client 273(a) (1980)). Thus, the plaintiff must show that she sustained a loss of an ascertainable amount.

Plaintiff contends she has introduced substantial evidence of damage because she has shown she incurred expenses in pursuing her claim against defendant. She showed there were claims she intended to raise in the modification action and she showed she lost her lien on the house.

Plaintiff's attorney fees in bringing this litigation are not a proper measure of her damages. Plaintiff may not obtain damages for her expenses in pursuing this litigation. The expenses of litigation are generally not recoverable in the absence of a statute authorizing such recovery. Harris v. Short, 253 Iowa 1206, 1208, 115 N.W.2d 865, 866 (1962). There is no basis here for plaintiff to recover attorney fees.

Plaintiff contends she was damaged because she asked defendant to raise additional claims regarding modification of the divorce decree. There is no evidence defendant's negligence affected plaintiff's right to enforce the provisions of her divorce decree. These claims were never litigated. See Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981) (issue preclusion prevents

relitigating issues raised and resolved in previous action). There is no evidence she suffered damage on this ground.

The only real question is has plaintiff shown she was damaged in losing the lien on the house. The lien had a maximum value of \$3,700, but that figure does not reflect the value of the lien at the time of trial. The record contains no evidence as to the value of the lien at the time of trial. The house was subject to a mortgage. For plaintiff's lien to have value, we would first need to determine whether the market value of the house exceeded the balance secured by the mortgage. Plaintiff testified the value of the house at the time of the divorce in 1980 was approximately \$50,000. The trial here took place in 1986. Plaintiff testified the house was in good repair, she had no reason to believe its value had decreased. Also, she was a signatory on the mortgage and had received no foreclosure notices. She claimed she had no reason to believe Krider was not making the payments on the house thereby increasing his equity.

Plaintiff introduced no evidence to show the value of the house, or the amount of debt on it, at the time of trial. When examined on the issue she testified:

Mr. Schoeller: You've got no evidence whatsoever to show me what the value of that house is; do you?

Ms. Beasley: No.

Mr. Schoeller: Or what's owed against that house, do you?

Ms. Beasley: No.

Evidence of the value of a piece of real estate six years earlier is not evidence of its current value. Plaintiff failed in her proof on damages. We note because of our holding we need not consider in determining proof of value the fact that plaintiff would only receive a portion of the sale proceeds if and when Krider moved from the house.

Substantial evidence is that which a reasonable mind would accept as adequate to reach a conclusion. Elliot v. Iowa Dep't of Transp., 377 N.W.2d 250, 256 (Iowa App. 1985). It need not be a preponderance, but a mere scintilla will not suffice. Id. We find no evidence in the record proving any monetary loss to the plaintiff. As there is not substantial evidence to support the district court judgment, it must be reversed.

**REVERSED.**