

IN THE COURT OF APPEALS OF IOWA

No. 0-645 / 90-370

AMERICAN STATE BANK, an Iowa Banking Corporation,

Plaintiff-Appellant,

vs.

TED ENABNIT and ENABNIT & KEEN, P.C.,

Defendants-Appellees,

and

HENRY M. KRAAYENBRINK,

Third Party Defendant.

FILED

JAN 29 1991

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Cerro Gordo
County, Carl E. Peterson, Judge.

American appeals a district court order dismissing its
claim for recovery on theories of negligence and contract
concerning the professional liability of an attorney.
REVERSED; JUDGMENT ENTERED ON PLAINTIFF'S PETITION.

Charles T. Patterson and John C. Gray of Eidsmoe,
Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux
City, for appellant.

Larry J. Cohrt of Swisher & Cohrt, Waterloo, for
appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.
Habhab, J., takes no part.

SACKETT, J.

This case addresses the issue of responsibility of an attorney who accepted money in his trust account to persons who were not his clients. We hold under the facts of this case the attorney had a duty to nonclients and breached that duty when he paid money in his trust account to his client and continued to represent to the nonclient the money was being held in trust. We reverse a judgment of the district court finding the attorney was not responsible. We enter judgment for plaintiff.

The case was tried to the court as a law action. The trial court made certain factual determinations. Neither party has a quarrel with the factual finding. The plaintiff contends the trial court applied the wrong law. We set out the relevant findings:

Henry M. Kraayenbrink and Betty M. Kraayenbrink executed a promissory note on November 21, 1979, and a mortgage on January 29, 1981, as additional security in favor of American State Bank on real estate located at 613 South Shore Drive, Clear Lake, Iowa. This mortgage was a second mortgage on the real estate.

On August 27, 1979, Joseph and Nancy Emerson purchased this real estate from the Kraayenbrinks on a land contract. They defaulted on the contract in 1981. Kraayenbrinks engaged Ted Enabnit . . . to initiate a lawsuit. As a result, on September 7, 1982, Ted Enabnit, as attorney for Henry M. Kraayenbrink and Betty M. Kraayenbrink filed a Petition in Equity (Cause No. 47440) against Joseph Emerson and Nancy Emerson, seeking monetary damages and reformation of the real estate contract. Earlier, Henry M. Kraayenbrink and Betty M. Kraayenbrink had defaulted on their promissory note to American State Bank and on September 8, 1981, American State Bank had filed a Petition in Equity (Cause No. 46812) against the Kraayenbrinks and Emersons seeking foreclosure of

the mortgage. American State Bank was represented by George F. Mattson, attorney at law. Loren J. Veldhuizen, attorney at law, appeared and filed an Answer on behalf of the Kraayenbrinks. Robert E. Dreher, attorney at law, appeared and filed an Answer on behalf of the Emersons.

On January 11, 1983, Robert Dreher filed a Motion to Consolidate the two lawsuits, on January 26, 1983, at the request of Loren Veldhizen, Ted Enabnit also appeared in the mortgage foreclosure proceedings on behalf of Henry m. Kraayenbrink and Betty M. Kraayenbrink.

Before Ruling was entered on the Motion to Consolidate, Ted Enabnit, at Mr. Dreher's request, drafted an agreement for signature of American State Bank and the Kraayenbrinks to delay the progress of the foreclosure action until the litigation was completed in Cause Number 47440. Ted Enabnit forwarded the agreement to Lloyd W. Bierma, as additional counsel for American State Bank, on June 10, 1983.

The agreement was revised, retitled "Stipulation," and submitted to the parties for signature. It provided that the Bank agreed to release the mortgage given as security for the Kraayenbrinks' note if the Kraayenbrinks turned over the full amount of any payments received under the Judgment entered in Equity Case Number 47440. It was executed on June 16, 1983, and returned fully executed to Ted Enabnit for filing. At Dreher and Bierma's request, Enabnit caused it to be filed in both Cerro Gordo Cases Number 47440 and 49299.

Enabnit advised Bierma that he would keep Bierma informed on the progress of the litigation. Judgment was entered on behalf of the Kraayenbrinks in Equity Number 47440 against the Emersons in the amount of \$55,974.18 plus interest at the rate of 10 percent from February 2, 1982, plus court costs. An appeal by Emersons was unsuccessful.

In May 1985, a \$20,000.00 payment was made by the Emersons to the Clerk of the District Court of Cerro Gordo County. The Clerk applied \$1,516.14 to court costs and the balance was remitted to Ted Enabnit's trust account to be distributed to American State Bank pursuant to the Stipulation signed by the parties.

On May 28, 1985, Enabnit wrote a check from the trust account of Enabnit & Keen, P.C., in the amount of \$18,483.86 to American State Bank.

On July 1, 1985, Enabnit noted an attorney's lien on the docket sheet in Case No. 47440. Enabnit did not notify his client of the claimed lien, nor did he file any documents reflecting a claim of lien in the case file. He had previously forwarded a copy of the docket sheet to Bierma to show the court costs. The attorney's lien notation was not reflected on the docket sheet at that time, and Enabnit did not advise Bierma or Dreher of any intent to claim a lien.

On July 16, 1986, a second check from the Emersons to the Clerk of the District Court in the amount of \$20,000 was deposited. The Clerk endorsed the check and the \$20,000.00 check was forwarded to Enabnit & Keen, P.C., trust account. Ted Enabnit reduced the check by \$12,119.00 representing his legal fees and the balance of \$7,881.00 was transmitted to American State Bank. The Bank had no express agreement with Enabnit to permit reduction of the distribution by his fees.

Enabnit had represented to American State Bank, after deducting the attorneys fees from the Emersons' second payment, that he would be filing suit against Thorkel K. Sondrol, III, to recover the attorneys fees deducted from the second payment, but expressing that he was "changing the agreement."

On August 6, 1985, Enabnit, on behalf of Henry m. Kraayenbrink and Betty M. Kraayenbrink, had filed an action (Cause No. 49299) alleging legal malpractice of Thorkel K. Sondrol, III, asserting that Sondrol negligently drafted the real estate contract between Emersons and Kraayenbrinks Unknown to American State Bank, Sondrol filed an Answer and as an affirmative defense, asserted that the claim was not timely filed by Enabnit, and was therefore barred by the statute of limitations.

On November 4, 1985, the third check from the Emersons in the amount of \$34,433.21 was delivered to the Clerk of Court, who endorsed the check over to Enabnit and Keen, P.C., trust account. The check remained in the trust account until December 23, 1985.

On December 23, 1985, at Henry and Betty Kraayenbrink's request, Ted Enabnit placed the funds in a Blue Chip Money Market Fund account at Pioneer Savings and Loan Association in the name of Henry Kraayenbrink and Betty Kraayenbrink, as tenants in common. The certificate expressly stated that both signatures of Henry Kraayenbrink and Betty Kraayenbrink were required to secure any funds from the Blue Chip Money Market Fund

account. Ted Enabnit was not named on the certificate, nor was American State Bank included as a party to said account. American State Bank was not aware that these funds had been placed in the money market account, nor was Bierma informed that the check had been received. Enabnit testified the money was not directly paid over to American State Bank upon instruction from Henry Kraayenbrink. Henry Kraayenbrink was disputing balance due, but Enabnit did not inform Bierma of this fact.

On January 21, 1986, Henry Kraayenbrink wrote to Pioneer Federal Savings and Loan Association requesting that the funds deposited in the Blue Chip Money Market Fund account be transferred to him in Arizona In response, Pioneer issued a check in the amount of \$33,465.41 payable to Henry Kraayenbrink and Betty Kraayenbrink closing the account, and forwarded the check to Henry Kraayenbrink. Henry Kraayenbrink endorsed the draft with his name and the name of his wife and converted the funds to his own use.

After repeated requests from American State Bank's counsel, Lloyd Bierma, to Ted Enabnit for information concerning the status of the third payment to American State Bank, Enabnit reported on March 7, 1986, that he was holding the \$33,268.21 in trust in an account accruing interest at the rate of 6.75 percent and advised Bierma that the funds would be turned over to American State Bank once the Kraayenbrinks executed a release releasing Thorkel K. Sondrol, III, from any liability arising out of the drafting of the real estate contract between Kraayenbrinks and Emersons.

The Sondrol malpractice claim was settled for \$7,500.00. As a part of the settlement, the malpractice carrier required that a release also include a provision releasing Ted Enabnit from liability. Dale W. Denherder, President of American State Bank, contacted Henry M. Kraayenbrink personally. Kraayenbrink met with Denherder in Phoenix, Arizona. Without knowledge or consultation with Ted Enabnit, Henry Kraayenbrink and the President of American State Bank negotiated and executed a "release statement" which recites, in pertinent part, as follows:

'American State Bank . . . in consideration of Henry M. Kraayenbrink, signing the release forms to release the funds now in escrow and release claim check number 874604 in the amount of \$7,500.00 to American State Bank, does hereby

release Henry M. Kraayenbrink from all notes, obligations and properties due and owing American State Bank.'

As a condition to signing, American State Bank agreed with Kraayenbrink to waive any deficiency. At that time, American State Bank expected to receive the \$7,500.00 and the \$34,433.21. At that time, unbeknownst to the Bank, but known by Henry M. Kraayenbrink, the funds had already been withdrawn from the account.

This lawsuit was filed on September 24, 1987, by American State Bank seeking to establish Enabnit's liability for professional negligence and breach of contract. Ted Enabnit and Enabnit & Keen, P.C., assert a third-party claim against Henry M. Kraayenbrink requesting indemnity from all claims by American State Bank, including cost, expenses, and attorney fees.

On February 22, 1988, default judgment was entered against Henry M. Kraayenbrink on the third-party claim.

After making the findings, the trial court held plaintiff did not establish a case of attorney malpractice against defendant in a nonattorney/client relationship and entered judgment for defendant.

Plaintiff appeals contending defendant would owe a general duty not to negligently or intentionally cause harm to American State Bank. Plaintiff contends defendant breached that duty by (1) performing as an escrow agent on behalf of both his client and American State Bank, and (2) creating within the plaintiff a reasonable reliance upon defendant's gratuitous undertaking, and (3) withdrawing from that gratuitous undertaking in such a way as to leave an unreasonable risk to plaintiff.

We agree with plaintiff that defendant owed it a general duty not to negligently cause it harm. This duty

existed regardless of the presence or absence of an express agency relationship between plaintiff and defendant. The duty existed because defendant used his trust account as an escrow fund in a manner that created within plaintiff a reasonable reliance that defendant would place all payments from the Emersons into the trust account and pay all sums over to the bank. In Gerard v. Peterson, 448 N.W.2d 699 (Iowa App. 1989), we concluded that a realtor, even one who is not in an agency relationship with purchasers of a home, still owes those purchasers a general duty not to negligently cause them harm. We expect no less from a practicing attorney. In fact, such a duty is consistent with Iowa Code of Professional Responsibility for Lawyers EC 7-10, which provides:

The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

The rules governing lawyers' trust accounts are generally set out in the Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rules DR 9-102 and 103.

Plaintiff's expert, John Nieman, a respected practicing attorney, testified that an attorney must make himself or herself a party signatory on his or her trust account to make certain the funds are not withdrawn without the authority of the lawyer. Mr. Nieman also testified an attorney has an obligation to regularly monitor that trust

account. Had the defendant exercised this control over the money paid to him in trust, Henry Kraayenbrink would not have been able to withdraw the \$33,465.41 which Kraayenbrink owed to plaintiff.

When defendant gratuitously agreed to place those funds in his trust account, and acted as an escrow agent, he took on a duty to perform the services of an escrow agent in a careful and competent manner.

The Kraayenbrinks had agreed any money received from the judgment against the Emersons was to be applied to repaying plaintiff's promissory notes. It was because of that agreement the Clerk issued checks to the defendant's trust account rather than to the Kraayenbrinks. Plaintiff relied upon defendant's assurance that the payments were placed in his trust account. Defendant participated in drafting the agreement where his client agreed to pay the funds to plaintiff. Defendant did not inform plaintiff when the money was withdrawn from the trust account and he represented the money was still in trust after it had been transferred to an account under his sole control.

Plaintiff clearly relied on defendant's representations and settled with Kraayenbrinks, releasing them from further liability. We reverse. We enter judgment for plaintiff for \$34,433.21.

REVERSED; JUDGMENT ENTERED ON PLAINTIFF'S PETITION.