FILED
JAN 31 1978
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

MEARL STRAIT,

Appellant,

v.

ROGER FREESE and WILLIAM NORTON, law firm of Norton and Freese, of Clarence, Iowa,

Appellees.

Filed January 31, 1978

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2-59045

Appeal from Linn District Court - Louis W. Schultz, Judge.

Malpractice claim against attorneys. Plaintiff appeals from summary judgment for defendants. Affirmed.

L. Vern Robinson, of Iowa City, for appellant.

James R. Snyder, of Cedar Rapids, for appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal from an order and judgment granting summary judgment for defendants in an action for damages founded on alleged legal malpractice. In plaintiff's recast petition[1] it is alleged that he had entered into an attorney-client relationship with defendants to pursue a cause of action he held against another attorney (hereinafter referred to as "first attorney") for infliction of emotional harm and mental anguish upon plaintiff either intentionally or in disregard of the natural consequences of the first attorney's acts. It is further alleged that if defendants had pursued this cause of action on plaintiff's behalf he would have recovered substantial damages from the first attorney. Plaintiff's claim against defendants asserts that they failed to pursue the claim until after the running of the statute of limitations, at which time they advised plaintiff that they did not wish to pursue it.

In delineating the issues presented, it must be noted that a claim for emotional distress is only one of several claims plaintiff purports to have had against the first attorney. The other claims, involving pecuniary loss from alleged legal malpractice, were pursued by plaintiff in another lawsuit brought after the time it is alleged defendants permitted the emotional distress claim to be barred by limitations. In his most recent recast petition, plaintiff bases his malpractice claim against defendants entirely upon their handling of his alleged claim for emotional distress against the first attorney.

The trial court sustained the motion for summary judgment for the reason, among others, that "the conduct [of the first attorney] described in the answer to interrogatories and in the deposition [of plaintiff] would not fit the pattern of outrageous conduct by a defendant that would give rise to the intentional tort theory." On this appeal, plaintiff urges that his answers to interrogatories and deposition answers support a claim of deliberate lying by the first attorney as to the status of a proposed lawsuit he had been engaged to bring on plaintiff's behalf. It is contended that under the circumstances shown to exist in plaintiff's personal situation it was foreseeable that

[1] Prior to this recast petition, plaintiff's wife had been an additional party plaintiff, but her standing to sue was adjudicated adversely to her by order of the trial court entered April 7, 1975. She never appealed from this ruling and is not a party to the present appeal.

such acts might produce severe or emotional distress. Based upon this contention he urges that there exists a genuine issue of material fact as to (a) whether the conduct in question was so extreme as to permit recovery under applicable law, and (b) whether the emotional distress was more than a reasonable man could be expected to endure.

Defendants contend the trial court correctly held that the acts relied upon for the emotional distress claim against the first attorney were legally insufficient under the rules laid down in Meyer v. Nottger, 241 N.W.2d 911, 918-21 (Iowa 1976); Amsden v. Grinnell Mutual, 203 N.W.2d 252, 255 (Iowa 1972); and in Restatement, Torts (2d) § 46(1). Defendants also contend that even if the ruling below cannot be sustained for the reasons relied upon by the trial court, we can affirm on other grounds included in the motion but not specifically ruled upon. See Ackerman v. James, 200 N.W.2d 818 (Iowa 1972). One of the grounds of the motion for summary judgment which was not ruled upon by the trial court was the claim that, at the time plaintiff was represented by the defendants, he never contemplated bringing an action against the first attorney for emotional distress, did not advise defendants that he did, and did not advise defendants of any facts which would give rise to such a claim.

The issue of whether the answers to interrogatories and deposition answers establish as a matter of law that plaintiff had no claim for emotional distress against the first attorney presents an extremely difficult and close question. We do not deem it necessary, however, to decide this matter in order to affirm the judgment of the trial court. Plaintiff in his deposition answers admits that he never advised defendants that he had sustained any emotional injuries or any other type of personal injury for which claim had to be made within two years under § 614.1(2), The Code. Discussions with defendants of his alleged damages, if any, concerned pecuniary loss sustained as a result of the first attorney's failure to pursue certain claims for faulty equipment used in plaintiff's business, some of which were the subject of another pending action[2] at the time plaintiff engaged defendants' services. Defendants contend that plaintiff acquiesced in a delay in suing the first attorney until the result of the litigation last referred to was known. While there appears to be a factual dispute as to this claimed

[2] As to these claims plaintiff was represented by an attorney other than the first attorney and defendants.

acquiescence, regardless of how this issue is resolved it remains clear that plaintiff never gave defendants any reason to believe he held an action against the first attorney for emotional distress.

We recognize that there are certain circumstances under which an attorney may be obligated to investigate and pursue his client's case beyond the information which the client has imparted to him. See, e.g., Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977). Giving full recognition to that principle, we nevertheless hold that on the record in the present case defendants, as a matter of law, were not guilty of negligence or a breach of their contractual obligations to plaintiff for failure to pursue a claim for emotional distress against the first attorney. This contention was properly advanced and factually supported in defendants' motion for summary judgment and the motion should have been sustained on this ground. Ackerman v. James, 200 N.W.2d 818 (Iowa 1972). See also McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152 (Iowa 1976).

The judgment of the trial court is correct and is affirmed.

AFFIRMED.