

IN THE COURT OF APPEALS OF IOWA

FILED

APR - 8 1983

CLERK SUPREME COURT

ELLEN SARGENT,

Plaintiff-appellee/cross-appellant,

Filed April 8, 1983

vs.

P. F. ELGIN,

Defendant-appellant/cross-appellee,

2-516
2-67593

and

STEPHEN A. HALL,

Defendant.

Appeal from Warren District court, Gene L. Needles, Judge.

Defendant appeals from the judgment entered on a jury verdict for plaintiff in this lawyer malpractice action. Plaintiff cross-appeals from the court's refusal to submit certain specifications of negligence. REVERSED.

Charles D. Hunter of Belin, Harris, Helmick & Heartney, Des Moines, for defendants.

Mark C. Smith, Des Moines, for plaintiff-appellee.

Considered en banc.

PER CURIAM

Defendant appeals from the judgment entered on a jury verdict for plaintiff in this lawyer malpractice action. Plaintiff cross-appeals from the court's refusal to submit certain specifications of negligence. We reverse the decision of the trial court, but do not reach the issue raised by plaintiff's cross-appeal.

This case arose out of a conflict over life insurance proceeds between the mother of the deceased and his widow. David Sargent had life insurance policies totaling about \$35,500. Named beneficiary was Wilma Sargent, David's mother. David had been married to Ellen Sargent, plaintiff in the present action, for about eleven months at the time of his death. He had considered changing the name of the beneficiary on the policy, but had not done so.

Ellen filed suit in February of 1979 against Wilma Sargent, asserting a right to a portion of the life insurance proceeds. Ellen was represented by P. F. Elgin, the appellant here. Wilma responded by hiring defendant Stephen A. Hall to defend her. Hall and Wilma Sargent agreed that he would receive a one-third contingent fee if successful in the defense.

Ellen and Wilma talked to each other about settling the suit and reached a direct agreement. Wilma was to receive \$15,000 "free and clear" and Ellen was to pay Wilma's attorney fees. At a settlement meeting, Wilma's attorney, defendant Hall, altered the agreement to provide for payment to Wilma of \$22,500. This was based upon a calculation that this amount would be necessary to cover his attorney fees and leave Wilma with \$15,000 "free and clear." At trial, Hall testified he made this change because he felt it was improper for his fees to be paid directly by an outsider, rather than by his client.

Having knowledge of, and despite the change, Elgin advised Ellen to sign the agreement. He reasoned that her case was weak and that she would fare better under the terms of the settlement. Ellen and Wilma signed the papers, and

the settlement was approved by the court. Ellen subsequently filed the suit against Elgin for malpractice, and against Hall for intentional interference with contractual relations. At trial, the court granted Hall's motion for a directed verdict at the close of all the evidence. Elgin's motion for a directed verdict was denied. The malpractice claim against Elgin was submitted to the jury, and it returned a verdict for Ellen in the amount of \$6,309.21.

On appeal, Elgin asserts that (1) plaintiff did not introduce substantial evidence that she would have recovered more in the underlying suit had Elgin not allegedly been negligent; (2) the standard of care for attorney malpractice must be established by expert testimony, of which there was none in this case; (3) the court should have instructed the jury that plaintiff could not recover without showing that she would have received more money from her suit in the absence of Elgin's alleged negligence; (4) jury instructions on damages and negligence were incomplete or incorrect; and (5) the jury should have been instructed that a contingent fee agreement was contractually binding, and therefore would affect plaintiff's recovery. Because we consider determination of the first issue raised on appeal to be dispositive, we will not reach the other issues raised by appellant.

On cross-appeal, plaintiff alleges error on the trial court's refusal to submit to the jury specifications of negligence based upon alleged breaches of the Iowa Code of Professional Responsibility.

Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. In reviewing the refusal to grant a directed verdict, we review the evidence in a light most favorable to plaintiff. Jones v. O'Bryon, 254 Iowa 31, 37, 116 N.W.2d 461, 465 (1962).

The central issue raised by appellant is whether a plaintiff who alleges legal malpractice in the handling of a lawsuit must show that more would have been

obtained out of the underlying lawsuit had the defendant attorney not been negligent in the particulars alleged. Plaintiff contends, and the trial court agreed, that a client's failure to recover what the client anticipated recovering is a sufficient basis to submit an attorney malpractice claim to the jury even if no evidence has been offered to show that what the client expected actually could have been obtained out of the underlying lawsuit. We do not agree.

The fundamental concept of a tort is a wrong with resulting damage. To constitute a tort, there must be an injury. Mere negligence establishes no right of action, and a tort occurs where injury is inflicted, and not where negligent acts leading to it are committed. Mike v. Lian, 322 Pa. 353, 185 A 775, 777 (1936). The Iowa Supreme Court has frequently stated that this basic principle applies in attorney malpractice cases, and that recovery in such cases is premised upon a showing that plaintiff would have achieved a better result in the underlying legal matter had the attorney not been negligent in the particulars alleged.

Smith v. Korf, Diehl, Clayton and Cleverley, 302 N.W.2d 137 (Iowa 1981), was an appeal from a summary judgment granted in an attorney malpractice claim. Plaintiff had filed suit alleging that, in its representation of him before the Jasper County Civil Service Commission, defendant failed to challenge biased commissioners as provided by Iowa Code section 17A.17(4)(1975), and failed to introduce available evidence which would have altered the outcome. The supreme court reversed and remanded on the ground that it could not "hold as a matter of law that the result before the commission would have been the same in the absence of these acts of alleged negligence." Id. at 140.

In Beek v. Kapalis, 302 N.W.2d 90, 93-94 (Iowa 1981) the court stated that "[t]o hold the attorney liable, a plaintiff must prove that he would have been successful in the underlying suit and that his claim was lost through the attorney's negligence." In Baker v. Beal, 225 N.W.2d 106 (Iowa 1975), the court stated that

prevailing case law provides that a client seeking to recover in an attorney malpractice action based upon negligent handling of a lawsuit for money damages must prove that the underlying suit would have been successful absent the lawyer's negligence. In Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 525 (Iowa 1983)(quoting 7A C.J.S. Attorney & Client § 273a 1980), the court stated that "[i]n a legal malpractice action, the general measure of damages is 'the amount of loss actually sustained as a proximate result of the conduct of the attorney.'"

Plaintiff contends that the present case may be distinguished from the cited authority on the grounds that, unlike prior cases on point, the present case does not involve the negligent handling or nonhandling of a lawsuit. However, the requirement that a plaintiff prove that a better result would have been obtained applies generally to legal malpractice actions and is not strictly limited to lawsuits alleging negligence in the handling of a lawsuit.

In the present case, plaintiff offered no evidence to support a claim that she had suffered any injury as a result of defendant's alleged negligence. Indeed, the testimony presented at trial supports the proposition that had plaintiff refused the settlement offer and litigated her claim she would have lost. Plaintiff argues that she had expected to receive more money from a settlement than she actually received. However, no evidence was offered from which we can infer that Wilma might have settled for less than \$15,000 "free and clear" had defendant been more vigorous in his negotiations.

The issue raised by plaintiff's cross-appeal is an issue of first impression in Iowa; however, it need not be reached in deciding the appeal. The claims that Elgin's alleged breaches of the Code of Professional Responsibility could be the basis for liability constituted four out of six specifications of negligence in plaintiff's petition. The case was submitted to the jury on the remaining

specifications, and the jury awarded plaintiff about \$6,000 in damages. The specifications of negligence based upon the alleged breaches of the Code of Professional Responsibility were offered to support plaintiff's claim that defendant was negligent. They had no bearing on the amount of damages awarded, as plaintiff's recovery for negligence based upon breaches of the Code, if awardable at all, could be no greater than her recovery based upon the specifications of negligence already given. Because the issue of negligence was already resolved in plaintiff's favor, the court's failure to submit the professional responsibility specifications was not harmful to plaintiff, and cannot be the basis for a successful cross-appeal.

REVERSED.