Legal Malpractice
&
Real Property Transactions

LEGAL EDUCATION DEPARTMENT
Attorneys' Title Fund Services, Inc.

Please contact the Education Registrar at (888) 407-7775 regarding this seminar or to register for any other Fund seminars

All references herein to title insurance policy forms and endorsements are intended to refer to the policy forms and endorsements issued by Fund members as duly appointed title agents of Old Republic National Title Insurance Company.

These materials are for educational use in Fund seminars. They should not be relied on without first considering the law and facts of a matter. Legal documents for others can only be prepared by an attorney after consultation with the client.

Legal Malpractice & Real Property Transactions (Webinar)

15.	*Lawyers Professional Liability v. McKenzie*, 470 So.2d 752 (Fla. 3d DCA 1985)
16.	*Atkin v. Tittle and Tittle*, 730 So.2d 376 (Fla. 3d DCA 1999)
17.	*McCarty v. Browning*, 797 So.2d 30 (Fla. 3d DCA 2001)
18.	*Proto v. Graham*, 788 So.2d 393 (Fla. 5th DCA 2001)
19.	*Stake v. Harlan*, 529 So.2d 1183 (Fla. 2d DCA 1988)
20.	*Lorraine v. Grover, Ciment et al.*, 467 So.2d 315 (Fla. 3d DCA 1976)
21.	*Bolves v. Hullinger*, 629 So.2d 198 (Fla. 5th DCA 1993)
22.	*Orr v. Black & Furci, P.A.*, 876 F.Supp. 1270 (M.D. Fla., Feb. 3,1995)
23.	*Johnson v. Allen, Knudson et al.*, 621 So.2d 507 (Fla. 2d DCA 1993)
Miscellaneous	
24.	Rule 4-5.7 Responsibilities Regarding Nonlegal Services, Rules Regulating The Florida Bar
25.	*Factsheet: Stress*, Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/stress, last accessed 2/18/20
26.	*Factsheet: Depression*, Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/depression, last accessed 2/15/20
27.	*Factsheet: Worried about a Colleague?* Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/worried-about-someone-else, last accessed 2/18/20
28.	Accreditation materials

References

Top five real estate attorney malpractice claims, (Apr. 2018) © 2018 The Hanover Insurance Group, Inc.

Avoiding Malpractice Traps, Risk Management Handouts of Lawyers Mutual, (Oct. 2017), Lawyers Mutual Liability Insurance Company of North Carolina

The Top Ten Causes of Malpractice – and How You Can Avoid Them, Mark C.S. Bassingthwaighte and Reba J. Nance, (Apr. 20-22, 2006), ABA Techshow 2006

How Incorporating These Best Practices Tips Will Help You Defend Against A Legal Malpractice Claim, Patrick Causey (Oct. 1, 2014), For The Defense, DRI Trial Tactics Magazine (Oct. 2014)

Legal Malpractice & Real Property Transactions

Bob Rohan
Regulatory Compliance Counsel

Statistics

- Real property law has become the largest source of professional malpractice claims (20% of all claims)
- One in five attorneys will be faced with a claim during their careers

Lawyer As Defendant

- Malpractice insurance is a “deep pocket”
- Jury prejudice
  - “He said, she said” usually resolved against attorney
  - “Reasonably prudent attorney” standard causes juries to expect more than the law requires

The Fund ALWAYS DRIVEN

3

Real Estate Attorney Malpractice Claims

The Hanover Insurance Group
(Apr. 2018)

Lawyers Mutual Liability Co. of North Carolina
(Oct. 2017)

The Fund ALWAYS DRIVEN

4

Hanover Insurance Group

1. Inaccurate property description
2. Cash back at closing fraud
3. Vague lease language (use of forms)
4. Inadvertent attorney-client relationship
5. Attorney acting as escrow agent

The Fund ALWAYS DRIVEN

5

Lawyers Mutual Liability Co.

1. Wire transfer security
2. Satisfaction of Home Equity Lines of Credit
3. Disbursements against uncollected funds
   - Caution: E&O Policy may exclude claims based upon disbursements of uncollected funds

The Fund ALWAYS DRIVEN

6

Professional Malpractice

Elements of a cause of action

1. Employment
2. Neglect of a reasonable duty
3. Proximate cause of loss

Dingle v. Dellinger, 134 So.3d 484 (Fla. 5th DCA, 2014)

Employment -- Privity

- Word of art derived from common law of contracts and used to describe relationship of persons who are parties to a contract
- Plaintiff must either be in privity with the attorney (or) an intended third party beneficiary

Espinosa v. Sparber, 612 So.2d 1378 (Fla. 1993)

The Fund ALWAYS DRIVEN

9

Employment -- Client

- Any person who consults a lawyer with purpose of obtaining legal services or who is rendered legal services (Sec. 90.502(1)(b), F.S.)
  - Subjective intent of the client based upon reasonable conclusions

Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992)

The Fund ALWAYS DRIVEN

10

Employment – Inadvertent relationship

- Attorney represented debtor/partner and handled mortgage closing on behalf of client and the partnership
  - Provided partnership with "clean" title commitment and unapproved mortgage
  - Did attorney also represent partnership?

Blackhawk v. Waltemyer, 900 F.Supp. 414 (M.D. Fla., Apr. 17, 1995)

The Fund ALWAYS DRIVEN

11

Employment – Inadvertent relationship

- Law firm represented president in stock purchase from corporation
  - Legal services benefitted corporation which paid all law firm's bills
  - Did firm represent corporation?

In re Lentek Int'l, Inc., 337 B.R. 396 (M.D. Fla., Oct. 1, 2007)

The Fund ALWAYS DRIVEN

12

Employment – 3rd party beneficiary

- Quitclaim deed failed because POA did not authorize gift
  - Attorney drafted and recorded it with POA
  - Was attorney liable to intended grantees?

Dingle v. Dellinger, 134 So.3d 484 (Fla. 5th DCA 2014)

Employment – 3rd party beneficiary

- Estate planning, ante-nuptial agreement review and probate advice given by three law firms
  - Did frustrated heirs have standing to sue?

Nieburg v. Sulzberger, 260 So.3d 363 (Fla. 3d DCA, 2018)

Employment – 3rd party beneficiary

- Services provided to condominium association related to reconstruction following hurricane
  - Association owed fiduciary duty to owners
  - Did owners have standing to sue attorneys?

Silver Dunes v. Beggs and Lane, 763 So.2d 1274 (Fla. 1st DCA, 2000)

The Fund ALWAYS DRIVEN

Employment – Assignment of claim

- Attorneys prepared misleading private placement memoranda for corporation leading to bankruptcy
  - Corporation gave assignment for benefit of creditors
  - Was malpractice claim assignable?

Cowan, Liebowitz & Latman v. Kaplan, 902 So.2d 755 (Fla. 2005)

The Fund ALWAYS DRIVEN

Employment – Assignment of claim

- Botched foreclosure caused loss of lien
  - Mortgage assigned while appeal of mortgage foreclosure dismissal was pending
  - Was assignor's potential malpractice claim included in assignment of mortgage?

Law Office of David J. Stern v. Security Nat., 969 So.2d 962 (Fla. 2007)

Neglect of a reasonable duty

- Attorney and client (purchaser) were aware of suit between association and builder
  - Attorney closed purchase without investigating nature of lawsuit
  - Did attorney have duty to investigate?

Maillard v. Dowdell, 528 So.2d 512 (Fla. 3d DCA 1988)

Neglect of a reasonable duty

- Law firm unable to clear title in time to save contract of sale
  - Subsequent sale for $500K less
  - Was allegation attorney "failed to timely act" sufficient?

Rios v. McDermott, Will & Emery, 613 So.2d 544 (Fla. 3d DCA 1993)

The Fund ALWAYS DRIVEN

19

Neglect of a reasonable duty

- Attorney did not prepare buy-sell agreement to accompany formation of closely held corporation
  - Attorney had previously provided one for same clients on similar incorporation
  - Did attorney have duty absent client direction?

Lane v. Cold, 882 So.2d 436 (Fla. 1st DCA 2004)

The Fund ALWAYS DRIVEN

20

Neglect of a reasonable duty

- Attorney hired to stall bail bond foreclosure
  - Failed to plead absolute defense to foreclosure
  - If instructions were followed is attorney liable for not asserting the absolute defense?

Boyd v. Brett-Major, 449 So.2d 952 (Fla. 3d DCA 1984)

The Fund ALWAYS DRIVEN

21

Neglect of a reasonable duty

- Legal description error fatal to validity of first foreclosure sale
  - Mortgagee "winning bid" set aside; reforeclosure resulted in mortgagor redemption
  - Was a duty to assist client in obtaining title reasonable?

Lawyers Professional Liability v. McKenzie, 470 So.2d 752 (Fla. 3d DCA 1985)

The Fund ALWAYS DRIVEN

22

Neglect of a reasonable duty

- Client closed on vacant lot and then was refused building permit because of lot size
  - Clause added to form contract allowed termination if lot non-conforming
  - Did lawyer have duty to investigate?

Atkin v. Tittle and Tittle, 730 So.2d 376 (Fla. 3d DCA 1999)

The Fund ALWAYS DRIVEN

23

Neglect of a reasonable duty

- Unpermitted downstairs enclosure in the Keys cited following closing and had to be removed
  - Attorney reviewed mortgage documents with "client" at closing
  - Is attorney required to advise client of adverse legal problems of which the attorney becomes aware?

McCarty v. Browning, 797 So.2d 30 (Fla. 3d DCA 2001)

The Fund ALWAYS DRIVEN

24

Neglect of a reasonable duty

- Investor caught up in mobile home mortgage fraud hired attorney to cut his losses
  - Attorney unsuccessful in negotiation loses at trial when unable to prove mortgagee complicity
  - Should attorney have recommended settlement?

Proto v. Graham, 788 So.2d 393 (Fla. 5th DCA 2001)

The Fund ALWAYS DRIVEN

25

Neglect of a reasonable duty

- "Due on sale" clause held enforceable by Florida Supreme Court on conflict certiorari
  - Mortgagee forecloses client who closed upon lawyer's assurance it was legally assumable
  - Does attorney awareness of unsettled law require disclosure?

Stake v. Harlan, 529 So.2d 1183 (Fla. 2d DCA 1988)

The Fund ALWAYS DRIVEN

26

Proximate cause

- Homestead devise of life estate to mother fails when decedent's minor child survives
  - Alternative planning to benefit mother was possible
  - Is an attorney required to do more than carry out testator's expressed directions in will drafting?

Lorraine v. Grover, 467 So.2d 315 (Fla. 3d DCA 1976)

The Fund ALWAYS DRIVEN

27

Proximate cause

- Attorneys represented terminated employee in age discrimination administrative proceeding
  - Statute of limitations ran before civil proceedings filed
  - Was client required to prove age discrimination allegations to succeed in malpractice action?

Bolves v. Hullinger, 629 So.2d 198 (Fla. 5th DCA 1993)

The Fund ALWAYS DRIVEN

28

Proximate cause

- Bankruptcy trustee alleges malpractice committed in criminal defense of debtor
  - Plea agreement did not protect defendant against tax consequences
  - Is a defendant's guilt proximate cause of damages?

Orr v. Black & Furci, P.A., 876 F.Supp. 1270 (M.D. Fla., Feb. 3,1995)

The Fund ALWAYS DRIVEN

29

Statute of limitations

- Law firm took voluntary dismissal of suit for fees to eliminate counterclaim for malpractice
  - Compulsory counterclaim to suit for fees
  - Can otherwise barred malpractice claim stand alone as counterclaim to withdrawn suit for fees?

Johnson v. Allen, 621 So.2d 507 (Fla. 2d DCA 1993)

The Fund ALWAYS DRIVEN

30

Top Ten Causes of Malpractice – and How You Can Avoid Them

Bassingthwaighte and Nance, ABA Techshow (April 2006)

The Fund ALWAYS DRIVEN

31

Bassingthwaighte and Nance

1. Missed deadlines
2. Lack of professionalism
3. Stress and substance abuse
4. Conflicts of interest
5. Poor client relations

The Fund ALWAYS DRIVEN

32

Bassingthwaighte and Nance

6. Substantive legal errors
7. Ineffective client screening
8. Malpractice counterclaim (suit for fees)
9. Inadequate documentation of work
10. Technology traps

The Fund ALWAYS DRIVEN

33

Best Practices

The Fund ALWAYS DRIVEN

34

Screen prospective clients

- Demanding, emotionally invested, or unrealistic about outcome
- Engagements with other attorneys

How Incorporating These Best Practice Tips
Will Help You Defend Against a Legal Malpractice Claim
Patrick Causey
DRI Trial Tactics (Oct. 2014)

Screen prospective clients

- Comfort with associated costs
- Acceptance of their obligations
- Communication expectations

DRI Trial Tactics (Oct. 2014)

Keep expectations realistic

- Guaranteeing result creates a breach of contract cause of action
  - Attorney of ordinary skill standard irrelevant
  - Expert witness no longer necessary
- Don't oversell the strength of your representation

DRI Trial Tactics (Oct. 2014)

The Fund ALWAYS DRIVEN

37

Document everything

- Nonengagement letter
- Attorney-client relationship does not exist
  - Date of consultation • Matter discussed
  - Nonengagement decision • Seek other counsel

Avoiding Malpractice Traps, Lawyers Mutual Liability Co. of No. Carolina (Oct. 2017)

The Fund ALWAYS DRIVEN

38

Document everything - Tip

- Begin every potential client conversation by gathering contact information
  - Name • Address • Phone number
  - General nature of the matter

Top Ten Causes of Malpractice, Bassingthwaighte and Nance (ABA Techshow Apr. 2006)

Document everything

- Disengagement Letter
- Attorney-client relationship no longer exists
  - Limits client expectations
  - Starts statute of limitations clock

Avoiding Malpractice Traps

Document everything

- Engagement letter (retainer agreement)
- Memorializes relationship and scope of representation
  - Timelines • Matters discussed and agreed to
  - Fees and costs • Communication protocols

Document everything

- Client decisions and instructions
  - Engagement letter informs client all oral communications reduced to writing (letter or email)
  - Benefits clients with little experience in complex legal issues

Document everything

- Client decisions and instructions
  - Claim: access easement noted on survey but no evidence on the ground; client tells his lawyer "don't worry about it"

Steer clear of conflicts

- Multiple parties
  - Request to "write the agreement for both of us"
    - Do not meet with both
      - Unintended attorney-client relationship
      - Conflict with one means conflict with all

Steer clear of conflicts

- Attorney as settlement agent
  - Responsibilities regarding nonlegal services
    - Services not distinct from legal services
    - Services distinct from legal services
    - Services by nonlegal entity (e.g., title company)

Rule 4-5.7 Rules Regulating The Florida Bar

The Fund ALWAYS DRIVEN

45

Substantive legal errors

- Don't dabble
  - No such thing as "simple will" or "simple contract"
  - Favors for friends or relatives also require professionalism

Top Ten Causes of Malpractice

The Fund ALWAYS DRIVEN

46

Substantive legal errors

- Prioritize CLE and take relevant courses
- Peer review your office's closed files
- Deal with mistakes immediately

Top Ten Causes of Malpractice

The Fund ALWAYS DRIVEN

47

Professional internal communications

- Subject to discovery
- Attorney-client privilege waived
  - Mistakes made
  - Client criticism
  - Fee boasting

DRI Trial Tactics (Oct. 2014)

The Fund ALWAYS DRIVEN

48

Professional internal communications

- Subject to discovery
- Claim:
  - "We're already $200,000 over estimate"
  - "Churn that bill, baby!"
  - "That bill shall know no limits"

DRI Trial Tactics (Oct. 2014)

Professionalism

- Breach of confidentiality
- eMail (spelling and grammar; signature block)
- Poor housekeeping (uncluttered office, dress professionally, courtesy and civility)

Top five real estate attorney malpractice claims, The Hanover Insurance Group (Apr. 2018)

Handling stress

- Time management
  - Calendar for “professional reading”, “business development”, and “personal time”
- Staffing
  - Adequate resources and training
  - Delegate

Technology traps

- “Delete” does not delete
- Metadata
- Portable storage devices (e.g., “flash” drive)
- Confidentiality disclaimers (“chat” messaging)

Fee disputes

- Is amount collectible?
- Is amount substantial?
- Was a good result obtained?
- Has independent lawyer reviewed file?
- Invitation to a malpractice counterclaim

"He who represents himself has a fool for a client."

— Abraham Lincoln


Thank You
The Fund
ALWAYS DRIVEN
55

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Estate of Schneider v. Finmann, N.Y., June 17, 2010

612 So.2d 1378
Supreme Court of Florida.

Marta ESPINOSA, et al., Petitioners,
v.
SPARBER, SHEVIN, SHAPO, ROSEN AND HEILBRONNER, et al., Respondents.

No. 79085.
|
Feb. 4, 1993.

Synopsis
Testator's children and estate brought legal malpractice action against attorney who prepared testator's will and his law firm. The Circuit Court, Dade County, Maria M. Korvick, J., granted summary judgment for attorney and law firm. Children and estate appealed. The District Court of Appeal, 586 So.2d 1221, affirmed in part and reversed and remanded in part. Question was certified. The Supreme Court, McDonald, J., held that daughter who was not named in will lacked standing to bring malpractice action but estate did have standing.

Question answered.

West Headnotes (6)

[1] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney's liability for negligence in performance of his or her professional duties is limited to clients with whom attorney shares privity of contract.

15 Cases that cite this headnote

[2] Contracts
Privity of Contract in General

In legal context, term "privity" is word of art derived from common law of contracts and used to describe relationship of persons who are parties to a contract.

3 Cases that cite this headnote

[3] Attorney and Client
In general; limitations

To bring legal malpractice action, plaintiff must either be in privity with attorney, wherein one party has direct obligation to another, or, alternatively, plaintiff must be intended third-party beneficiary.

33 Cases that cite this headnote

[4] Wills
Ascertainment from words of will

To the greatest extent possible, courts and personal representatives are obligated to honor testator's intent in conformity with contents of will.

2 Cases that cite this headnote

[5] Attorney and Client
In general; limitations

Standing in legal malpractice actions involving wills is limited to those who can show that testator's intent as expressed in will is frustrated by negligence of testator's attorney.

19 Cases that cite this headnote

[6] Attorney and Client
In general; limitations

Testator's daughter, who was born between first and second codicils to will, was not in privity with attorney who drafted will and was not an intended third-party beneficiary and, thus, lacked standing to bring legal malpractice action against attorney for negligence in failing to provide for after-born children in will and first codicil and omitting provision for her in second codicil; however, testator's estate stood in shoes of testator and did have standing to bring such an action.

38 Cases that cite this headnote

Attorneys and Law Firms

***1378** Fred E. Glickman, Miami, for petitioners.

Jeffrey M. Weissman of Weissman, Lichtman & Dervishi, P.A., Fort Lauderdale, and Lenard H. Gorman of Lenard H. Gorman, P.A., Miami, for respondents.

Opinion

***1379** McDONALD, Justice.

We review *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 586 So.2d 1221 (Fla. 3d DCA 1991), which involves the following question of great public importance certified in an unpublished order dated September 17, 1991:

> UNDER THE FACTS OF THIS CASE ... MAY A LAWSUIT ALLEGING PROFESSIONAL MALPRACTICE BE BROUGHT, ON BEHALF OF PATRICIA AZCUNCE, AGAINST THE DRAFTSMAN OF THE SECOND CODICIL?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. We answer the question in the negative and approve the decision of the district court.

Howard Roskin, a member of the Sparber, Shevin law firm, drafted a will for Rene Azcunce, the testator. At the time he signed his will, Rene and his wife, Marta, had three children, Lisette, Natalie, and Gabriel. Article Seventeenth of the Will specifically provided that:

> (a) References in this, my Last Will and Testament, to my children, shall be construed to mean my daughters, LISSETE AZCUNCE and NATALIE AZCUNCE, and my son, GABRIEL AZCUNCE.
>
> (b) References in this, my Last Will and Testament, to my "issue," shall be construed to mean my children [as defined in Paragraph (a), above] and their legitimate natural born and legally adopted lineal descendants.

Article Fourth of the will established a trust for the benefit of Marta and the three named children and also granted Marta a power of appointment to distribute all or a portion of the trust to the named children and their issue. In addition, the will provided that, upon Marta's death, the trust was to be divided into equal shares for each of the three named children.

Neither the will nor the first codicil to the will, executed on August 8, 1983, made any provisions for after-born children. On March 14, 1984, Patricia Azcunce was born as the fourth child of Rene and Marta. Rene contacted Roskin and communicated his desire to include Patricia in his will. In response, Roskin drafted a new will that provided for Patricia and also restructured the trust. However, due to a disagreement between Rene and Roskin on the amount of available assets, Rene never signed the second will. Instead, on June 25, 1986, he executed a second codicil drafted by Roskin that changed the identity of the co-trustee and co-personal representative, but did not provide for the after-born child, Patricia. When Rene died on December 30, 1986, he had never executed any document that provided for Patricia. [1]

Marta brought a malpractice action on behalf of Patricia and the estate against Roskin and his law firm. The trial court dismissed the complaint with prejudice for lack of privity and entered final summary judgment for Roskin and his firm. The Third District Court of Appeal reversed the dismissal with regard to the estate, affirmed it with regard to Patricia, and certified the question of whether Patricia has standing to bring a legal malpractice action under the facts of this case.

[1] **[2]** **[3]** An attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract. *Angel, Cohen & Rogovin v. Oberon Investments, N.V.,* 512 So.2d 192 (Fla.1987). In a legal context, the term "privity" ***1380** is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract. *Baskerville–Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc.,* 581 So.2d 1301 (Fla.1991). To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary. In the instant case, Patricia Azcunce does not fit into either category of proper plaintiffs.

[4] In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party. *Rosenstone v. Satchell,* 560 So.2d 1229 (Fla. 4th DCA 1990); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.,* 467 So.2d 315 (Fla. 3d DCA 1985). Because the client is no longer alive and is unable to testify, the task of identifying those persons who are intended third-party beneficiaries causes an evidentiary problem closely akin to the problem of determining the client's general testamentary intent. To minimize such evidentiary problems, the will was designed as a legal document that affords people a clear opportunity to express the way in which they desire to have their property distributed upon death. To the greatest extent possible, courts and personal representatives are obligated to honor the testator's intent in conformity with the contents of the will. *In re Blocks' Estate,* 143 Fla. 163, 196 So. 410 (1940).

[5] **[6]** If extrinsic evidence is admitted to explain testamentary intent, as recommended by the petitioners, the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator. For these reasons, we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney. Although Rene did not express in his will and codicils any intention to exclude Patricia, his will and codicils do not, unfortunately, express any affirmative intent to provide for her. Because Patricia cannot be described as one in privity with the attorney or as an intended third-party beneficiary, a lawsuit alleging professional malpractice cannot be brought on her behalf.

Rene's estate, however, stands in the shoes of the testator and clearly satisfies the privity requirement. Therefore, we agree with the district court's decision that the estate may maintain a legal malpractice action against Roskin for any acts of professional negligence committed by him during his representation of Rene. Because the alleged damages to the estate are an element of the liability claim and are not relevant to the standing question in this particular case, we do not address that issue.

For the reasons stated above, we answer the certified question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

All Citations

612 So.2d 1378, 18 Fla. L. Weekly S98

Footnotes

1 Patricia brought suit in probate court to be classified as a pretermitted child, which would have entitled her to a share of Rene's estate. Her mother and adult sibling consented to Patricia's petition being granted. The probate court judge appointed a guardian ad litem for Patricia's two minor siblings, and the guardian opposed the petition. Subsequently, the court ruled that the second codicil destroyed Patricia's status as a pretermitted child, and the decision was upheld on appeal. *Azcunce v. Estate of Azcunce,* 586 So.2d 1216 (Fla. 3d DCA 1991).
We are not privy to the factors that the guardian ad litem considered in deciding not to consent to Patricia's classification as a pretermitted child, a decision that deprived Patricia of a share in the estate and ultimately led to costly litigation. We hope, however, that a guardian evaluating the facts of this case would not focus strictly on the financial consequences for the child, but would also consider such important factors as family harmony and stability.

607 So.2d 494
District Court of Appeal of Florida,
Fourth District.

Ruth DEAN, and Barry Krischer, Petitioners,
v.
Roger DEAN, Respondent.

No. 92–0669.
|
Nov. 4, 1992.
|
Rehearing Denied Dec. 2, 1992.

Synopsis

Victim moved to compel attorney to identify person who engaged attorney to return victim's stolen property. The Circuit Court, Palm Beach County, Jack H. Cook, J., granted the motion, and attorney petitioned for writ of certiorari. The District Court of Appeal, Farmer, J., held that identity of client was privileged.

Writ granted, order quashed, and subpoena dismissed.

Glickstein, C.J., dissented and filed opinion.

West Headnotes (7)

[1] Privileged Communications and Confidentiality

Subject Matter; Particular Cases

For purposes of determining whether attorney was privileged from disclosing identity of caller seeking to return stolen goods, caller's reference to earlier matter in which attorney had asserted attorney client privilege to avoid disclosing name of hit-and-run driver indicated that caller was seeking legal advice and intended all communication with attorney, including identity, to be confidential. West's F.S.A. §§ 90.101–90.958; West's F.S.A. Bar Rule 4–1.6.

[2] Privileged Communications and Confidentiality

Relation of Attorney and Client

Existence of attorney-client privilege does not depend on whether client actually hires attorney; it is enough if client merely consults attorney about legal question with a view to employing attorney professionally. West's F.S.A. §§ 90.101–90.958; West's F.S.A. Bar Rule 4–1.6.

6 Cases that cite this headnote

[3] Attorney and Client

What constitutes a retainer

Whether person who consults lawyer is a "client," for purposes of evidence code depends on subjective intent of person seeking consultation rather than what lawyer does. West's F.S.A. § 90.502(1)(b).

7 Cases that cite this headnote

[4] Privileged Communications and Confidentiality

Client information; retainer and authority

Under "last-link" exception to rule that client's identity is not privileged, attorney may not be compelled to disclose client's identity if mere identity of client might expose him to prosecution for criminal acts previously committed and for which client consulted attorney. West's F.S.A. §§ 90.101–90.958; West's F.S.A. Bar Rule 4–1.6.

2 Cases that cite this headnote

[5] Courts

Intermediate appellate court

In the absence of controlling precedent from its own district, trial court is required to follow decision of another District Court of Appeal regardless of district in which trial court sits.

1 Cases that cite this headnote

[6] Privileged Communications and Confidentiality

Client information; retainer and authority

Despite contention that attorney merely acted as conduit for return of stolen property, identity of client who engaged attorney solely for purpose

of returning stolen property was privileged from disclosure. West's F.S.A. §§ 90.101–90.958; West's F.S.A. Bar Rule 4–1.6.

1 Cases that cite this headnote

[7] Attorney and Client

What constitutes a retainer

Legal advice is a "legal service" for purposes of determining whether attorney-client relationship exists. West's F.S.A. §§ 90.101–90.958; West's F.S.A. Bar Rule 4–1.6.

7 Cases that cite this headnote

Attorneys and Law Firms

***495** Joel M. Weissman of Joel M. Weissman, P.A., West Palm Beach, and Barry E. Krischer of Salnick & Krischer, West Palm Beach, for petitioners.

Joseph D. Farish of Farish, Farish, and Romani, of West Palm Beach, for respondent.

Opinion

FARMER, Judge.

The issue raised here is whether the attorney-client privilege can be used to prevent the disclosure of the identity of a person who had previously consulted an attorney regarding the return of stolen property belonging to one of the parties in a civil case. As we explain along the way, under the circumstances of this case the privilege bars such disclosure.

[1] The facts are unusual, to say the least. During the pendency of the Deans' dissolution of marriage case, the husband's place of business was allegedly burgled, resulting in the loss of two duffel bags containing various personal items belonging to husband's daughter, and from $35,000 to $40,000 in cash. Sometime after the theft, an unidentified person telephoned Krischer at his office. He related the conversation as follows:

> I received a telephone call from an individual who knew that I was an attorney; knew I was an attorney that was involved in the Baltes[1] matter and the individual asked me for advice with regard to returning property. I advised this person on the telephone that the experience that I have had in the State Attorney's office was that the best avenue was to turn the property over to an attorney and let the attorney bring it to the State Attorney's office or to the law enforcement.

At another point, Krischer added:

> Obviously I have been through this before and I knew all the questions to ask this person and I got all the responses back which indicates to me this person knew I was a lawyer, was asking for legal advice and did not want their identity revealed.

Krischer met twice and had one telephone conversation with this person. Nearly six weeks after the second meeting, the two duffel bags containing only the daughter's personal property were delivered to Krischer's office by someone who told his receptionist that he "would know what they are." No cash was included with the returned items. Krischer then delivered the bags to the police, telling them that they "may have some connection with" husband.

In a twist of irony, these events came to light through Krischer's former secretary, who had also by then become a client of husband's lawyer. Soon after, husband's lawyer served Krischer with a subpoena for a deposition, seeking the identity of Krischer's contact. Krischer asserted the privilege at the deposition. Husband then moved to compel the testimony. After a hearing, the trial court granted the motion, saying in part:

> The purpose of the attorney-client privilege is to encourage the free and full disclosure by clients of information to attorneys so that adequate legal representation can be supplied. It is not however the purpose of the attorney-client privilege to act as a vehicle by which individuals can use an attorney to insulate themselves from

disclosure relative to activities which do not involve legal representation. In this case, Mr. Krischer did not appear in court or render any legal opinions; rather he merely advised the person to use an attorney as a conduit and then acted in that capacity to ***496** deliver stolen goods to the police. He did nothing and gave no opinions that could not have been done or given by any member of the public.

There are other factors which weigh against the existence of an attorney-client relationship. Mr. Krischer testified that when he is hired by a new client it is his office procedure to create a three by five card with the name and address of the client; and to enter the name of the client in his computer system. None of these office procedures were followed with reference to this individual. Mr. Krischer also testified that he did not receive a fee for his services in this matter and that he does not expect to receive a fee in the future. While these facts certainly do not preclude the existence of an attorney-client relationship, I find them to be more consistent with Mr. Krischer having acted as a conduit than as an attorney in this matter.

The court concluded that there was no attorney-client relationship, and thus no privilege, and ordered Krischer to answer the questions as to the identity of his contact. Krischer and the wife in the dissolution proceedings have filed a petition for a common law writ of certiorari in which they seek to quash the decision and to uphold the privilege. [2]

The attorney-client privilege, though dating back to Elizabethan England, did not become developed in its present form until the nineteenth century. 8 Wigmore, *Evidence,* § 2290 (McNaughton rev. 1961) [Wigmore]. It rests on the theory that:

> "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit the disclosure except on the client's consent."

8 Wigmore at § 2291. One of the most eloquent formulations of the rationale for the privilege is thus:

> Let the person be who he may, strong or weak, learned or unlearned, wise or foolish, a man of influence and invested with authority, or destitute of means and utterly helpless, his claims are equally to be laid before the judge with all the power of advocacy of which they are susceptible. To accomplish this object, the first indispensable requisite is, that the client shall so state to his legal advisers *all* the facts of his case. Very few clients can perceive wherein their strength lies. They must state *the whole* to the legal adviser, and leave him to form his own judgment. * * * [E]very man can ascertain the law by consulting a lawyer. But then the condition, upon which this power of ascertaining the law will rest is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost extent, or it will not be made. Thus it will be one consequence of [the failure to accord the privilege], that the law will be in no way open to the community at large: to them it will be a sealed book * * *. [e.o.]

8 Wigmore at § 2291.

By the early eighteen hundreds, it was generally understood that the privilege did not depend on the existence of a formal proceeding or even an incipient controversy; rather it was accepted that all "communications made in seeking *legal advice for any purpose* were within the principle of the privilege." [e.o.] 8 Wigmore at § 2294. As Wigmore describes this development, the privilege was in time extended:

> to include communications made, first during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, *in any*

> *consultation for legal advice,* wholly irrespective of litigation or even of controversy. [e.s.]

8 Wigmore at § 2290. In the words of the treatise, "[i]t has never since been doubted to be the law." *Id.*

[2] In short, since its modern development, the privilege is founded wholly on *subjective* considerations: "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of ***497** compelled disclosure by the legal advisers must be removed * * *." 8 Wigmore at § 2291. Or, as it was stated more recently:

> The [privilege] rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). Hence, it logically follows that the privilege does not turn on the client actually hiring or engaging the attorney; it is enough if the client merely consulted the attorney about a legal question "with the view to employing [the attorney] professionally * * * although the attorney is not subsequently employed." *Keir v. State,* 152 Fla. 389, 394, 11 So.2d 886, 888 (1943).

[3] What thus originally began as the product of prudential rules devised by common law judges in recognition of these ideas has now become codified by statute,[3] as well as disciplinary rules governing the conduct of lawyers.[4] Although FEC section 90.102 provides generally that the Florida Evidence Code supersedes the common law, it is also generally accepted that FEC section 90.502 represents a codification of pre-code law on the privilege. *See* Charles W. Ehrhardt, *Florida Evidence,* § 502.1 (1992 Ed.). Under FEC section 90.502(1)(b), a "client" is defined as any person "who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." We construe this language as continuing the common law focus on subjective considerations, viz., on the person seeking consultation with a lawyer, rather than on what the lawyer does.

It is thus necessary in this case that we focus not on what Krischer did but on what the client intended. Krischer testified that his contact sought legal advice from him—which is, he contends, paradigmatically a legal service—and hence became his client for the purpose of invoking the privilege. We agree.

Krischer's testimony makes plain the intent of his client.

> Q. Is it true that the employment by you, by person "x" was predicated on the fact that you would keep person "x's" identity confidential?
>
> A. Yes, that was the condition of the employment.
>
> Q. Was your employment also a condition that you were person "x's" lawyer for all purposes?
>
> A. Correct. The individual called—I can expedite this if I can state a couple of things, judge. I had obviously been through this previously in another case. I was well aware of what was needed to be established in order to protect this ***498** client. I inquired of this client if that individual knew I was an attorney. That individual indicated that they did. I inquired if they were seeking legal advice. They indicated that they did. They discussed a legal problem with me. I gave them legal advice.
>
> A condition precedent to this person discussing the legal problem with me was that I not divulge their identity. This person came to me with knowledge of my previous actions in a previous case and felt that I could be trusted, and on that condition precedent I listened to the problem, gave advise [sic] and rendered legal services.

The trial judge obviously accepted this testimony as truthful, but said that he must look beyond Krischer's "conclusion in this regard to the underlying facts." In effect, the court decided that the issue should turn on what the undisclosed person sought to accomplish with the legal advice obtained or on what Krischer did in consequence of the contact, citing *Anderson v. State,* 297 So.2d 871 (Fla. 2d DCA 1974), and *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970).

Anderson is nearly, but not quite, the duplicate of this case. The petitioner there was charged with receiving and concealing stolen property. He retained Korones as his lawyer. Sometime after, the stolen property was delivered

to Korones's office, and he turned it over to the police. He and his receptionist were thereupon subpoenaed by the state to testify at trial. After the trial judge refused to quash the subpoenas and compelled their testimony, he sought common law certiorari review of the order. The Second District granted the writ and quashed the order compelling the testimony.

Initially the court disposed of the notion that the return of the stolen property was not an act of communication, but was instead conduct unprotected by the privilege. The court squarely concluded that the return of the goods to the attorney's receptionist constituted communication contemplated by the privilege. Illustrating the point that there is a conflict in the theories when clients give physical evidence to attorneys, the court cited the decisions in *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970), and *State v. Olwell,* 64 Wash.2d 828, 394 P.2d 681 (1964).

Judge (now Justice) Grimes explained *Hughes* as involving the use of a lawyer to return stolen property merely because the attorney was good friends with the police department, and not out of any desire to use the attorney for the rendition of legal services. In *Olwell,* the attorney was representing a person under investigation in a knife murder, and the attorney was subpoenaed by the state to appear at a coroner's inquest and bring with him all knives in his possession and relating to his client. The Washington court recognized that the privilege applied to testimony by the attorney as to the delivery of the knife, but the privilege did not prevent the knife itself being obtained from the attorney, so long as he was protected against disclosure as to how he acquired it.

[4] At that point in *Anderson,* Judge Grimes observed that making Korones tell who gave him the stolen property amounted to little more than requiring an attorney to identify his client, a kind of disclosure that traditionally has not been protected by the privilege. He concluded, however, that there is a recognized exception to the client identity rule where the mere identity of the person may expose him to prosecution for criminal acts previously committed and for which the person has consulted the attorney. 297 So.2d at 874 (citing *Sepler v. State,* 191 So.2d 588 (Fla. 3d DCA 1966)). [5]

The *Anderson* court concluded that the exception governed and that the privilege barred the disclosure. The court noted that the person had consulted the attorney concerning an already completed criminal act and not a future one. Equally important, the court noted, was that the revelation of the identity might lead to the conviction of the person "because of an action he ***499** took in connection with a matter for which he retained Korones in the first place." As Judge Grimes wrote:

> In the final analysis, the petitioner would not have delivered the items to Mr. Korones any more than he would have talked to Mr. Korones about them except for the fact that Mr. Korones was representing him as his attorney. Therefore, we hold that neither Mr. Korones nor his receptionist can be required to divulge the source of the stolen items. * * *

297 So.2d at 875. We find this rationale directly applicable to this case.

[5] And yet the trial court rejected *Anderson* in favor of *Hughes.* Apart from the fact of the court failing to follow Florida precedent in favor of another state's, [6] we conclude that the trial court has misinterpreted the privilege and the policies underlying it. It is indisputable that his contact, like the client in *Anderson,* consulted Krischer as an attorney. It is indisputable that the client sought legal advice about a specific matter. It is indisputable that the specific matter concerned a crime that had already been committed, not a planned or future act which might be a crime. And it is indisputable that the client insisted on confidence.

[6] **[7]** The focus, as we have seen from the common law development of the privilege and our own FEC section 90.502 definition of "client", is on the perspective of the person seeking out the lawyer, not on what the lawyer does after the consultation. As we have also seen, it has long been understood that the representation of a client in a court or legal proceeding is not indispensable for the invocation of the privilege. That Krischer's client sought him out for purely legal advice was enough. Legal advice, after all, is by itself a legal service. It is not necessary to the existence of the privilege that the lawyer render some additional service connected with the legal advice. Nor, as we know, is it even necessary that the lawyer appear in court or contemplate some pending or future legal proceeding.

And even if it were, the engagement of an attorney to effect the return of stolen property should certainly qualify. Surely

there is a public purpose served by getting stolen property in the hands of the police authorities, even if the identity of the thief is not thereby revealed. Here the consultation resulted in exactly that. Krischer advised his client to turn over the property to the state attorney or the police. A lawyer's advice can be expected to result in the return of the property if the confidentiality of the consultation is insured.

At the same time, even if the person who returns the property is the thief, there is an equal privilege against self incrimination as well as a right to the effective assistance of counsel in defending against the criminal charge. That the criminal charge is not yet pending when the thief seeks to return previously stolen property after consultation with a lawyer is, as we have seen, irrelevant to the privilege. Thus, the mere fact that the consulted attorney acts as a "conduit" for the return of stolen property does not support the conclusion that the attorney has engaged in unprotected consultation with the person seeking the advice.[7] A legal service has been rendered just as surely as when the lawyer represents the accused thief in a criminal trial.

We need not be long detained by Krischer's failure to follow his usual procedures ***500** for enrolling new clients, or that he did not expect to receive a fee for his services. These facts dwell on Krischer's actions, not on his client's purpose in contacting him. The failure of Krischer to memorialize his dealings with this client is not surprising in view of the obvious need for confidentiality in the matter, coupled with the limited amount of time and work necessary for Krischer to render his services to the client. Payment of a fee has never been indispensable to the relationship or the existence of the privilege. Charles W. Ehrhardt, *Florida Evidence,* § 502.2 (1992 Ed.).

We find that the trial court departed from the essential requirements of law in compelling disclosure of Krischer's client. We grant certiorari, quash the order requiring Krischer to reveal the identity of his client, and dismiss the subpoena.

CERTIORARI GRANTED; ORDER QUASHED; SUBPOENA DISMISSED.

GUNTHER, J., concurs.

GLICKSTEIN, C.J., dissents with opinion.

GLICKSTEIN, Chief Judge, dissenting.

The attorney in this case described his participation as a "conduit," who had been contacted by an unnamed party, to deliver stolen property to the police, and who subsequently delivered the property to the police. The attorney's participation was concluded when the stolen property was turned over to the police. The attorney was not paid a fee for his participation, and he did not expect to be paid a fee. Furthermore, standard office procedures regarding new clients were not followed in this matter.

In my view, the evidence in this case clearly shows that the unnamed party intended for the attorney to act merely as an agent or conduit for the delivery of property which was completely unrelated to legal representation. The evidence also shows that the attorney in this case was not acting in his professional capacity. For these reasons, I believe the attorney-client privilege does not apply to these circumstances. *See Skorman v. Hovnanian of Florida, Inc.,* 382 So.2d 1376, 1378 (Fla. 4th DCA 1980); *In re Witness Before Grand Jury No. 82–5,* 558 F.Supp. 1089 (S.D.Fla.1983); *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970).

All Citations

607 So.2d 494, 17 Fla. L. Weekly D2533

Footnotes

1 This refers to a widely publicized case in which a hit-and-run driver consulted Krischer for advice and, afterwards, Krischer asserted the attorney-client privilege when asked to disclose the name of the driver. The fact that the person consulting Krischer in this case referred to the widely publicized case when Krischer kept the identity of his contact confidential might reasonably be taken as evidencing the contact's strong interest in confidentiality.

2 We agree with husband and the trial court that the wife has no standing to assert the privilege, so her presence in these proceedings can safely be discounted.

3 *See* Section 90.502, Florida Statutes (1991), which provides in relevant part:

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

All references to the Florida Evidence Code, sections 90.101–90.958, Florida Statutes (1991), are thus: "FEC section 90.502."

4 *See* Rule Regulating The Florida Bar 4–1.6, which provides:

(a) A lawyer shall not reveal such information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

(b) A lawyer shall reveal such information to the extent the lawyer believes necessary:

(1) To prevent a client from committing a crime;

(2) To prevent a death or substantial bodily harm to another.

(c) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

(3) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) To respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) To comply with the Rules of Professional Conduct.

(d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

5 This theory is sometimes described as the "last-link" exception, i.e. the identity is the last link in the chain of evidence needed to convict of the crime. *See Corry v. Meggs,* 498 So.2d 508 (Fla. 1st DCA 1986), *rev. denied,* 506 So.2d 1042 (Fla.1987).

6 In the absence of controlling precedent from its own district court, any trial court in Florida, irrespective of the district in which it sits, is required to follow the decision of any other district court of appeal in Florida. *Weiman v. McHaffie,* 448 So.2d 1127 (Fla. 1st DCA 1984), and *State v. Hayes,* 333 So.2d 51 (Fla. 4th DCA 1976).

7 In contrast, the attorney in *Hughes* testified that he had been contacted only to deliver stolen property to the police. His contact reached out for him, not because he was a lawyer, but instead because he was a good friend of many members of the police force. Unlike Krischer here, he gave no legal advice. His services amounted to a phone call informing the police that, if they were interested in the return of stolen property, they could pick it up on the attorney's front porch. Not surprisingly, the court determined that this attorney rendered no legal service, and therefore could not invoke the attorney-client privilege. 453 S.W.2d at 542.

900 F.Supp. 414
United States District Court,
M.D. Florida,
Fort Myers Division.

.

BLACKHAWK TENNESSEE, LTD. PARTNERSHIP,
a Tennessee Limited Partnership, Plaintiff,
v.
Roger L. WALTEMYER, individually
and O'Halloran, Johnson,
Waltemyer & Hussey, Defendants.

No. 93–313–CIV–FTM–17D.
|
April 17, 1995.

Synopsis

Partnership which had made loan to individual partner following filing of bankruptcy petition by partner brought action for fraud and legal malpractice action against attorney and law firm which had represented partner after validity of mortgage taken in connection with loan was challenged. Attorney and law firm moved for summary judgment, and the District Court, Kovachevich, J., held that: (1) fact issue as to existence of legal relationship between partnership and attorney was presented by evidence of partnership's intent that attorney represent it, and (2) fact issues as to whether attorney had made misrepresentations to partnership and whether damages to partnership were as result proximately caused precluded summary judgment.

Motion denied.

West Headnotes (11)

[1] Federal Civil Procedure
Ascertaining existence of fact issue

At summary judgment stage, function of judge is not to himself weigh evidence and determine truth of matter, but to determine whether there is genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Federal Civil Procedure
Lack of cause of action or defense

Federal Civil Procedure
Presumptions

Summary judgment should only be entered when moving party has sustained its burden of showing absence of genuine issue as to any material fact when all evidence is viewed in light most favorable to non-moving party; all doubt as to existence of genuine issue of material fact must be resolved against moving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Federal Civil Procedure
Lack of cause of action or defense

Movant is entitled to entry of summary judgment only when non-moving party has failed to articulate evidence as to essential element of its case. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[4] Attorney and Client
Pleading and evidence

Under Florida law, former client who brings legal malpractice claim generally must plead and prove attorney's employment, attorney's neglect of reasonable duty, and that attorney's negligence resulted in and was proximate cause of loss to client.

1 Cases that cite this headnote

[5] Attorney and Client
In general; limitations

Under Florida law, legal malpractice action requires either that plaintiff be in privity with attorney, wherein one party has legal obligation to another, or that plaintiff be intended third party beneficiary of legal obligation.

1 Cases that cite this headnote

[6] Attorney and Client

What constitutes a retainer

Under Florida law, existence of legal or attorney-client relationship depends on intent of prospective client, not on actions of lawyer.

2 Cases that cite this headnote

[7] Federal Civil Procedure

Tort cases in general

Fact issue as to whether attorney-client relationship existed under Florida law between partnership and attorney who had represented individual partner in connection with loan to individual partner by partnership and issuance of quitclaim deed in connection with loan, precluding summary judgment in legal malpractice action brought by partnership, was presented by evidence that partnership intended that attorney perform legal work for it, and that attorney prepared mortgage documents and title work in connection with transfer and forwarded fully executed title commitment to partnership.

1 Cases that cite this headnote

[8] Fraud

Elements of Actual Fraud

Under Florida law, false statements relied upon to one's detriment are actionable.

[9] Fraud

Fraudulent Concealment

Under Florida law, silence can be equated with fraud where there is legal or moral duty to speak or where inquiry left unanswered would be intentionally misleading.

[10] Federal Civil Procedure

Tort cases in general

Fact issue as to whether attorney who represented individual partner who received loan from partnership and issued quitclaim deed in connection with loan had made fraudulent or misrepresented statement to partnership regarding bankruptcy court approval of loan, precluding summary judgment on fraud, negligence, and misrepresentation claims asserted by partnership, was presented by dispute as to whether attorney told partnership loan had been approved, even though title commitment presented by attorney which did not contain exclusion for bankruptcy approval induced partnership to believe approval had been given.

[11] Federal Civil Procedure

Tort cases in general

Fact issue as to whether partnership suffered damages which were proximately caused by alleged misrepresentations made by attorney for individual partner in connection with bankruptcy court approval of loan by partnership to partner, precluding summary judgment, was presented by evidence that partnership was general unsecured creditor of partner, that validity of partnership's mortgage obtained in connection with loan had been challenged, that partnership's insurance for mortgage had been denied, and that partner had failed to make payments on its loan.

Attorneys and Law Firms

***416** Joseph C. Mason, Jr., Anne S. Mason, Mason & Associates, P.A., Clearwater, FL, Frank G. Abernathy, McMackin, Garfinkle, McLemore & Walker, Nashville, TN, for plaintiff.

Paul E. Liles, O'Halloran, Johnson, Waltemyer & Hussey, Ft. Myers, FL, E.E. Edwards, Edwards & Simmons, P.A., Nashville, TN, for Roger L. Waltemyer and O'Halloran, Johnson, Waltemyer & Hussey.

ORDER ON MOTION FOR SUMMARY JUDGMENT

KOVACHEVICH, District Judge.

This cause is before the Court on Defendants' Motion for Summary Judgment and memorandum in support thereof (Dkt. Nos. 37 and 38), and response thereto (Dkt. No. 46).

FACTS AND PROCEDURAL HISTORY

This is an action for fraud and legal malpractice in connection with a commercial real estate closing and the lending of money to a bankrupted debtor. In December of 1991, Hugh Lee Nathurst, III, Debtor, retained Defendant, Roger Waltemyer, to represent him in a bankruptcy filing in the Middle District of Florida. Mr. Waltemyer accepted and undertook such representation, submitting the paperwork, including the schedules signed by Debtor, to the Court to commence a Chapter 11 proceeding. Debtor is the brother of Plaintiff's limited partner.

The bankruptcy schedules filed with the Court list Debtor's fee simple interest in a real estate development called the "Blackhawk" project, as well as a 25% personal property interest in property held in trust known as Lofton's Island.

The Blackhawk development was designed to be a 73 site, single family home project. Debtor experienced difficulty with the development of Blackhawk and was unable to pay the mortgages held by the National Bank of Lee County (NBLC) when they fully matured on December 13, 1990. NBLC held a first mortgage over the Blackhawk property.

Ray C. Nathurst, Davis H. Carr, John M. Stewart, Jr., and Blackhawk–Tennessee, Inc., as general and limited partners, created Blackhawk–Tennessee, Ltd. (Plaintiff) on or about August 16, 1991. The purpose of this limited partnership was to acquire and develop the Blackhawk property. Davis H. Carr withdrew as a limited partner on or about April 3, 1992.

On or about September 6, 1991, Debtor transferred a fee simple interest in Blackhawk to Plaintiff. On October 16, 1991, Plaintiff filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Middle District of Tennessee, Case No. 391–09941, in order to restructure the mortgage on Blackhawk.

The venue of Plaintiff's Tennessee Chapter 11 case was challenged, and the case was transferred to the Middle District of Florida, Case No. 91–16308–9P1. The development was subsequently transferred to Debtor for valid consideration.

On December 10, 1991, Debtor filed a Chapter 11 Bankruptcy Petition in the Middle District of Florida. Defendants handled this bankruptcy action.

NBLC filed a Motion to Dismiss Plaintiff's Chapter 11, which was granted on January 10, 1992. On January 15, 1992, NBLC filed a motion for relief from the automatic stay in Debtor's bankruptcy case seeking permission to foreclose its mortgage on Blackhawk, or be given adequate protection.

Both parties knew that Plaintiff's loan to Debtor required Bankruptcy Court approval. On February 4, 1992, Plaintiff executed a quit-claim deed of the Blackhawk property to Debtor. The mortgage, which indicates Defendant as the preparer and recorder in connection ***417** with the closing, contained no condition concerning bankruptcy approval.

At a hearing on February 6, 1992, Defendant, appearing for Debtor, informed the Bankruptcy Court that a loan was being obtained which would allow Debtor to make adequate protection payments and forestall the foreclosure of the mortgage. Debtor orally agreed with counsel for NBLC to adequate protection payment schedule that would stay foreclosure proceedings until July 20, 1992. NBLC required Debtor to pay $35,506.26 for each periodic adequate protection payment. The first payment was due on March 1, the second on March 15, and four subsequent payments were due on the 15th day of April, May, June, and July.

The Bankruptcy Court accepted the agreement and entered an order on February 11, 1992. The order provided that by July 20, 1992, Debtor had to submit a contract for sale of the entire property without meaningful contingencies and which was acceptable to NBLC. If Debtor was unable to comply with the order, then NBLC would be allowed to foreclose.

On February 18, 1992, Plaintiff and Debtor signed a letter of intent that the loan would be at least $600,000.00. Wire instructions for having the adequate protection funds, due on March 1, sent to Debtor for Blackhawk, were sent to Plaintiff on February 28, 1992, at the request of Debtor. Plaintiff provided Debtor with protection payments for March 1 and March 15, although the loan closing was not completed until April 1, 1992.

Plaintiff obtained a loan commitment from the Bank of Nashville which was conditional on the express approval of the Bankruptcy Court enabling Plaintiff to receive super-priority treatment under the Bankruptcy Code. This was also essential to the validity of the Lofton's Island mortgage in Lee County, Florida.

On June 2, 1992, Defendant filed a Motion for Authorization to Obtain Credit for the loan from Plaintiff. At the August 6 hearing, the Bankruptcy Court denied the motion and formally issued its order on August 21, 1992. The case was converted from a Chapter 11 to a Chapter 7 on or about August 10, 1993.

In July 1992, NBLC sought relief from the Bankruptcy stay because Debtor had been unable to comply with the adequate protection order in that he was unable to secure a purchaser for Blackhawk by July 20, 1992. The Court granted relief. Several efforts to hold off foreclosure were considered and attempted, but none was successful. NBLC eventually foreclosed on Blackhawk and extinguished all other interests.

STANDARD OF REVIEW

[1] This Court authorizes summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "At the summary judgment stage the judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[2] This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.,* 708 F.2d 655 (11th Cir.1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant,* 595 F.2d 994, 996–997 (5th Cir.1979), quoting *Gross v. Southern Railroad Co.,* 414 F.2d 292 (5th Cir.1969).

[3] The United States Supreme Court in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) put to rest any lingering doubts as to the strict requirements of Rule 56, Fed.R.Civ.P. The movant is entitled to entry of a summary judgment only where the other party has failed to articulate evidence as to an essential element of their case. *Id.* at 322–23, 106 S.Ct. at 2552–53.

*418 DISCUSSION

[4] "Generally, in a claim for legal malpractice, plaintiffs must plead and prove: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; (3) the attorney's negligence resulted in and was the proximate cause of loss to the client/plaintiff." *Orr v. Black & Furci, P.A.,* 876 F.Supp. 1270 (M.D.Fla.1995).

Choice of Law

Defendant asserts that the choice of law in this case must be Florida law under the Restatement (Second) Conflict of Laws, and the Florida Supreme Court's adoption of the Restatement's "most significant relationship" analysis. *Bishop v. Florida Specialty Paint Co.,* 389 So.2d 999 (Fla.1980). Since Plaintiff agrees to the resolution of the issues under Florida law, the Court will not address this issue further.

Legal Relationship

[5] Under Florida law, a legal malpractice action requires the plaintiff either to be in privity with the attorney, wherein one party has a legal obligation to another, or alternatively, the plaintiff must be an intended third party beneficiary. *Espinosa v. Sparber, Shevin, Shapo, Rosen, and Heilbronner,* 612 So.2d 1378 (Fla.1993).

[6] Defendants claim they owed no duty to Plaintiff due to the lack of an attorney-client relationship between the parties. A legal relationship depends on the intent of the "client," not on the actions of the lawyer. *Dean v. Dean,* 607 So.2d 494 (Fla. 4th DCA 1992).

[7] Section 90.502(1)(b), Florida Evidence Code, defines "client" as any person "who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." In this instance, a factual dispute exists as to whether Defendants provided Plaintiff with the legal services of: (1) preparing the mortgage documents, (2) recording the mortgage documents after closing, (3) preparing the title work, and (4) forwarding the fully executed title commitment to Plaintiff.

However, Plaintiff's intent that Defendants provide these legal services establishes a sufficient attorney-client relationship between the parties to allow Plaintiffs to pursue a claim for legal malpractice. Defendants' failure to establish that

Plaintiff lacked this intent precludes an entry of summary judgment based on an absence of an attorney-client relationship.

Misrepresentation, Fraud, or Negligence

Defendant also claims that the lack of evidence of a fraudulent or misrepresented statement bars summary judgment here. However, Plaintiff asserts that Defendants made several direct and indirect representations upon which Plaintiffs relied to its detriment.

[8] **[9]** Under Florida law, false statements relied upon to one's detriment are actionable. *George Hunt, Inc. v. Wash Bowl, Inc.,* 348 So.2d 910 (Fla. 2d DCA 1977). Silence can be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. *U.S. v. Prudden,* 424 F.2d 1021 (11th Cir.) *cert. denied,* 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970).

[10] Defendants' presentation of a signed title commitment absent exclusions for bankruptcy approval and their recording of the unconditional mortgage of the property that was security for the loan induced Plaintiff to believe that bankruptcy approval had been met. All parties indicate their understanding that bankruptcy approval was a requirement for the loan transaction.

However, there remains some dispute as to whether Defendants told Plaintiff that the Bankruptcy Court had approved the loan. The remaining material factual issues in dispute preclude this Court from entering summary judgment for misrepresentations, fraud, and/or negligence.

Proximate Causation to Damages

[11] Finally, Defendants assert that Plaintiff has not sustained any damages as a result of the actions or omissions of Defendants. In response, Plaintiff claims but for Defendants' negligence and misrepresentations regarding the bankruptcy loan approval, ***419** they would not have incurred the following damages: (1) Plaintiff is a general unsecured creditor; (2) the validity of Plaintiff's mortgage has been challenged in the bankruptcy case; (3) Plaintiff's insurance for said mortgage has been denied; and (4) Plaintiff has suffered actual damages as a result of Debtor's failure to make payments on its loan. Since proximate causation is normally a factual issue, reasonable minds could differ as to the proximate causation of the damages incurred by Plaintiff.

CONCLUSION

In conclusion, the Court finds that Plaintiff has successfully established: (1) the legal relationship between the parties is at issue; (2) the negligence or fraudulence of Defendants remains in dispute; and (3) the acts or omissions of Defendants proximately caused damage to Plaintiff is in controversy. Accordingly it is

ORDERED that Defendants' Motion for Summary Judgment (Dkt. No. 37) is **denied.**

DONE and ORDERED.

All Citations

900 F.Supp. 414

377 B.R. 396
United States Bankruptcy Court,
M.D. Florida,
Orlando Division.

In re LENTEK INTERNATIONAL, INC., Debtor.
Michael Moecker, as Liquidating Trustee
for Lentek International, Inc., Plaintiff,
v.
Greenspoon, Marder, Hirschfeld, Rafkin,
Ross, Berger & Abrams Anton P.A., a
Florida Professional Association, and
Gregory Blodig, Individually, Defendants.
Michael Moecker, as Liquidating Trustee
for Lentek International, Inc., Plaintiff,
v.
Greenspoon, Marder, Hirschfeld, Rafkin,
Ross, Berger & Abrams Anton P.A., Defendant.

Bankruptcy No. 6:03–bk–08035–KSJ.
|
Adversary Nos. 05–190, 05–81.
|
Oct. 1, 2007.

Synopsis

Background: Liquidating trustee in Chapter 11 case filed by corporate debtor brought adversary proceeding to recover for malpractice allegedly committed by law firm during its representation of debtor, and law firm defended on theory that it had not represented debtor, but had attorney-client relationship only with debtor's principal.

Holdings: The Bankruptcy Court, Karen S. Jennemann, J., held that:

[1] liquidating trustee failed to establish existence of attorney-client relationship between law firm and corporate debtor; and

[2] statement that law firm had made, in interrogatory relating to liquidating trustee's fraudulent transfer claims against it, that it had accepted challenged payments from Chapter 11 debtor-corporation in good faith for legal services that directly or indirectly benefited debtor, was not necessarily inconsistent with its subsequent position, in defense of liquidating trustee's legal malpractice claims, that it did not have attorney-client relationship with debtor.

So ordered.

West Headnotes (13)

[1] Attorney and Client
In general; limitations

In proceeding brought by liquidating trustee of corporate Chapter 11 debtor to recover for alleged malpractice of law firm that purportedly represented debtor in connection with stock purchase transaction, Florida law supplied and controlled legal standard applicable for determining whether the requisite attorney-client relationship existed between law firm and debtor.

[2] Attorney and Client
What constitutes a retainer

Test used by Florida courts to determine whether attorney-client relationship exists in absence of formal retainer is subjective one, that hinges on client's reasonable belief that he is consulting lawyer in that capacity and his manifested intention to seek professional legal advice.

[3] Attorney and Client
What constitutes a retainer

Under Florida law, actual consultation between putative client and alleged attorney is prerequisite to client's forming the reasonable belief required to support existence of attorney-client relationship.

[4] Attorney and Client
What constitutes a retainer

Post-consultation, it is the subjective, reasonable belief of putative client that is paramount consideration under Florida law in determining whether attorney-client relationship exists, not lawyer's actions.

1 Cases that cite this headnote

[5] Attorney and Client

What constitutes a retainer

Under Florida law, mere fact that law firm may have performed legal work that benefited putative client is not alone sufficient, irrespective of putative client's subjective intent, to establish existence of attorney-client relationship.

1 Cases that cite this headnote

[6] Attorney and Client

What constitutes a retainer

Under Florida law, while fact that attorney renders legal services to putative client may carry some weight as factor in assessing reasonableness of putative client's subjective belief that attorney-client relationship exists between parties, it does not conclusively establish existence of attorney-client relationship.

1 Cases that cite this headnote

[7] Attorney and Client

What constitutes a retainer

Liquidating trustee suing to recover for alleged malpractice of law firm that purportedly represented corporate Chapter 11 debtor in connection with stock purchase transaction between its two principals failed to establish existence of attorney-client relationship between law firm and corporation, though some of work which law firm performed on shareholder's behalf may have benefited corporation, though corporation paid all of law firm's bills, and though shareholders, to extent that they retained counsel to represent them individually only and not to represent corporation, may have breached their fiduciary duties to corporation, where shareholders, the only two persons with authority to hire attorney on corporation's behalf, testified clearly and consistently that they did not believe that law firm represented corporation.

[8] Estoppel

Claim inconsistent with previous claim or position in general

Judicial estoppel is equitable doctrine invoked at court's discretion, that precludes party from asserting inconsistent claims in legal proceedings.

[9] Estoppel

Claim inconsistent with previous claim or position in general

Courts can invoke doctrine of judicial estoppel to protect integrity of judicial process by prohibiting parties from deliberately changing positions.

1 Cases that cite this headnote

[10] Estoppel

Claim inconsistent with previous claim or position in general

Doctrine of judicial estoppel should not be invoked when party's allegedly inconsistent prior position was result of inadvertence or good faith mistake.

1 Cases that cite this headnote

[11] Estoppel

Claim inconsistent with previous claim or position in general

Courts generally consider two factors in deciding whether to apply judicial estoppel in particular case: whether allegedly inconsistent position was asserted under oath in prior proceeding, and whether such inconsistencies are shown to have been calculated to make mockery of judicial system.

1 Cases that cite this headnote

[12] Estoppel

Claim inconsistent with previous claim or position in general

Courts must consider all circumstances in deciding whether to apply judicial estoppel.

[13] Estoppel

Claim inconsistent with previous claim or position in general

Statement that law firm had made, in interrogatory relating to liquidating trustee's fraudulent transfer claims against it, that it had accepted challenged payments from Chapter 11 debtor-corporation in good faith for legal services that directly or indirectly benefited debtor, was not necessarily inconsistent with its subsequent position, in defense of liquidating trustee's legal malpractice claims, that it did not have attorney-client relationship with debtor but was retained solely as counsel to debtor's principal; accordingly, law firm's answer to interrogatory did not judicially estop it from denying that it had acted as debtor's counsel for purpose of malpractice claims.

Attorneys and Law Firms

***398** Chad K. Alvaro, David M. Landis, Jon E. Kane, Mateer & Harbert PA, Orlando, FL, for Plaintiff.

Brian L. Wagner, Marshall Dennehey Warner Coleman & Goggi, Marty A. Stone, Greenspoon Marder, Victor S. Kline, Orlando, FL, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING WHETHER DEFENDANTS HAD AN ATTORNEY–CLIENT RELATIONSHIP WITH DEBTOR

KAREN S. JENNEMANN, Bankruptcy Judge.

In these adversary proceedings asserting claims for malpractice and fraudulent transfer,[1] the sole issue is whether the defendants, a law firm, Greenspoon, Marder, Hirschfeld, Rafkin, Ross, Berger & Abrams Anton, P.A. ("Greenspoon Marder"), and one of its lawyers, Gregory J. Blodig ("Blodig"), ever established an attorney-client relationship with the corporate debtor, Lentek International, Inc. Greenspoon Marder certainly represented Lentek's president, Louis Lentine, in his purchase of Lentek's stock. The parties dispute, however, whether the law firm also represented Lentek, the corporation, in addition to representing Mr. Lentine, individually.

According to the plaintiff, Michael Moecker, as Lentek's liquidating trustee,[2] Lentine improperly used Lentek's assets to purchase shares of Lentek stock that Lentine later sold at a substantial profit.[3] The profits benefitted Lentine individually to the possible detriment of Lentek. If Greenspoon Marder represented Lentek in this transaction and Lentek was harmed, the law firm arguably is liable for Lentek's damages. However, Greenspoon Marder argues that no attorney-client relationship ***399** ever existed between Lentek and the law firm. The Court agrees and concludes that the defendants never held an attorney-client relationship with Lentek, rather, they represented only Lentine and his interests, individually, during the stock transaction and at all other relevant times.

As a threshold matter, the parties disagree on the relevant legal standard to use in determining whether an attorney-client relationship exists under Florida law. Defendants' counsel, citing *Lombardo v. U.S.,* 222 F.Supp.2d 1367, 1385 (S.D.Fla.2002), *Gonzalez v. Chillura,* 892 So.2d 1075 (Fla.2d DCA 2004); *The Florida Bar v. Beach,* 675 So.2d 106 (Fla.1996); *Bartholomew v. Bartholomew,* 611 So.2d 85, 86 (Fla.2d DCA 1992); and *Jackson v. BellSouth Telecommunications,* 372 F.3d 1250, 1281–83 (11th Cir.2004) argues that the criteria for establishing an attorney-client relationship is limited to the putative client's subjective, reasonable beliefs and the client's manifestation, or absence of manifestation, of his or her intent to seek legal advice. Plaintiff's counsel, on the other hand, citing, most relevantly, *State v. Branham,* 952 So.2d 618, 620–21 (Fla.2d DCA 2007); *Keepsake Inc. v. P.S.I. Industries, Inc.,* 33 F.Supp.2d 1033 (M.D.Fla.1999); *Blackhawk Tenn. Ltd. Partnership v. Waltemyer,* 900 F.Supp. 414 (M.D.Fla.1995); and *In re Lawrence,* 217 B.R. 658, 664 (Bankr.S.D.Fla.1998), argues that the test is broader and disjunctive, and that an attorney-client relationship may be present either where: (i) a person consults with an attorney for the purpose of obtaining legal services, *or* (ii) an attorney has rendered legal services to a person.

Essentially, the plaintiff argues that merely performing legal services that may inure to the benefit of Lentek *alone* is enough to establish an attorney-client relationship, irrespective of the subjective intent of both the law firm, who never agreed to represent the debtor, and the principals of Lentek, who never sought to hire the law firm on behalf of

the corporation. The difference between the two arguments is significant because both of the debtor's representatives with authority to hire an attorney for the debtor specifically testified that Greenspoon Marder did *not* represent the debtor and that they never asked the law firm to represent the debtor. Applying the defendants' version of the test would then end the inquiry because Lentek's representatives never hired the defendants on Lentek's behalf. Under the plaintiff's version of the test, however, the Court would be permitted to make a finding of an attorney-client relationship if it found that the defendants rendered legal services to the debtor, regardless of the subjective intent of either of Lentek's representatives. After a careful consideration of the relevant law, the Court concludes that the proper test for determining the existence of an attorney-client relationship is the test articulated by the defendants, and not the test advocated by the plaintiff, for the reasons explained below.

[1] **[2]** **[3]** **[4]** Florida law supplies and controls the legal standard applicable in this case for determining whether an attorney-client relationship is present. *The Florida Bar v. Beach,* 675 So.2d 106, 109 (Fla.1996) (*citing Bartholomew. v. Bartholomew,* 611 So.2d 85 (Fla.2d DCA 1992)). In a decision binding on this Court, *Jackson v. BellSouth Telecommunications,* 372 F.3d 1250, 1281–83 (11th Cir.2004), the Court of Appeals for the Eleventh Circuit articulated the test used by Florida courts "to determine whether a lawyer-client relationship exists in the absence of a formal retainer."[4] *Jackson,* 372 F.3d at 1281. ***400** According to the Eleventh Circuit, the applicable test "is a subjective one and hinges upon the client's [reasonable] belief that he is *consulting* a lawyer in that capacity and his *manifested intention* is to seek professional legal advice." 372 F.3d at 1281 (*citing Bartholomew,* 611 So.2d at 86 (other citation and internal quotation marks omitted)). In a footnote, notably, the Eleventh Circuit Court stated that "[t]he subjective belief test is applied only *after* a putative client consults with an attorney, and is used to emphasize that, following a consultation, it is the belief of the putative client *and not the lawyer's actions* that determines whether a lawyer-client relationship has developed." *Jackson,* 372 F.3d at 1281, n. 29 (*citing Dean v. Dean,* 607 So.2d 494, 496–97 (Fla. 4th DCA 1992)) (second emphasis added). Thus, an actual consultation is a prerequisite to forming a reasonable belief supporting an attorney-client relationship. Post-consultation, the subjective, reasonable belief of the putative client is the paramount consideration in determining whether or not an attorney-client relationship is present, not the lawyer's actions.

Indeed, three of the cases cited by the plaintiff recite the very same test articulated by the Eleventh Circuit in *Jackson. See Blackhawk,*[5] 900 F.Supp. at 418 ("A legal relationship depends on the intent of the client,' not on the actions of the lawyer."); *Lawrence,*[6] 217 B.R. at 664 ("The ***401** test for determining whether the attorney-client relationship exists is based in part upon the subjective belief that the client is being represented by an attorney. However, this belief must be a reasonable one."); *Keepsake,* 33 F.Supp.2d at 1036 (In Florida, the existence of an attorney-client relationship hinges "upon the client's reasonable subjective belief that he is consulting a lawyer in that capacity with the intention of seeking professional legal advice.").

[5] Not one case cited by the plaintiff actually holds that a law firm performing legal work *alone* and irrespective of a client's subjective intent is sufficient to establish an attorney-client relationship. Rather, the plaintiff supports his argument relying on the definition of "client" contained in Section 90.502 of the Florida Evidence Code, titled "Lawyer-client privilege." Section 90.502(1)(b) of the Florida Evidence Code, intended to assist parties and the courts in determining when an attorney properly may claim an attorney-client privilege against testifying, defines a "client" as "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services *or who is rendered legal services by a lawyer.*" (emphasis added). Here, the plaintiff argues that, based on the evidence, the Court can conclude that the defendants performed legal services for Lentek. As such, they "rendered legal services," and the Court should find they established an attorney-client relationship with Lentek, regardless of Lentek's representatives' lack of intent to hire Greenspoon Marder on Lentek's behalf.

The Court rejects this argument finding that the definition of a "client" supplied in Florida Statute Section 90.502 pertains specifically to the proper use of the attorney-client privilege and does not articulate the test for determining whether an attorney-client relationship exists under the law of Florida and the Eleventh Circuit. Indeed, Section 90.502, by its own limiting language, states that the test was for the purpose of that particular section only. As such, Section 90–502 does not control, nor should it.

[6] The proper test to use in determining whether an attorney-client relationship was formed is whether the putative client formed a reasonable, subjective belief that

an attorney-client relationship existed. How can a client hire a lawyer if the requisite intent is lacking' Certainly, whether or not an attorney actually rendered legal services can be considered in connection with whether or not a putative client's subjective belief is reasonable. Following a consultation, and in the absence of an executed retainer agreement, if no services were performed by the attorney, the putative client's argument that an attorney-client relationship existed may seem less reasonable. Conversely, applying the same scenario where no retainer exists following a consultation, if an attorney does render legal services and the services span a significant period of time, a client's subjective belief that he or she was represented by that attorney may be quite reasonable. Thus, although the fact that an attorney renders legal services may carry some weight as a factor in assessing the reasonableness of a person's subjective belief, it does not conclusively establish the existence of an attorney-client relationship. The issue, therefore, as stated by the Eleventh Circuit Court of Appeals, is whether ***402** Lentek held a "subjective but reasonable belief" that Blodig and Greenspoon Marder represented it.

[7] In this case, assessing the reasonableness of a client's belief is complicated by the fact that the putative client is a corporation, Lentek, controlled by two principals, Lentine and Joseph Durek, and by the fact that the disputed transaction involved Lentine's purchase of Durek's stock in order to gain control of Lentek's operations. Certainly, the nature of these transfers among insiders obfuscates the issue.

Prior to October 2002, Lentine and Durek shared control of Lentek. Both were the sole officers and substantial shareholders of the corporation each owning 45 percent of the corporate shares. In September 2002, the relationship between the insiders had deteriorated to the point that Durek was willing to sell his Lentek shares to Lentine and, from that point onwards, to allow Lentine to manage the business. The shareholders agreed to the basic terms of a stock transfer on September 16, 2002. (Plaintiff's Ex. No. 3).

Both gentlemen then hired lawyers. Durek hired Steven Lee of the Dean, Mead, Egerton, Capouano & Bozarth, P.A. law firm. Lentine hired Greg Blodig with Greenspoon Marder. (Plaintiff's Ex. No. 5).

Mr. Lee maintained the corporate records of Lentek and drafted the necessary corporate resolutions as well as the initial version of the documents related to the stock transfer. Mr. Blodig then reviewed the proposed drafts and made responsive comments on behalf of Lentine. (Plaintiff's Ex. Nos. 14 to 19). Most of the comments focused on the Stock Purchase Agreement, which was the primary document executed by both Lentine and Durek. (Plaintiff's Ex. No. 19). However, Blodig's comments also address three related agreements—a Non–Solicitation Agreement, a Consulting Agreement, and a Representation Agreement, each initially drafted by Durek's lawyer. (Plaintiff's Ex. Nos. 20–22).

These related agreements were solely between Durek and Lentek. Lentine signed them only in his capacity as President of Lentek. The related agreements promised Durek certain continuing financial benefits and incentives after he sold his stock to Lentine.[7] Lentek was primarily liable for performing these obligations; however, Lentine also remained individually liable pursuant to his agreement to indemnify Durek for any breach by Lentek.

The plaintiff asserts that Blodig's editorial comments on the related agreements constituted legal work rendered by the defendants on behalf of Lentek. Given Lentine's continuing financial obligations for these corporate obligations to Durek, however, it appears more likely that Blodig was simply protecting Lentine, rather than protecting Lentek. Nothing in the evidence indicated that Blodig ever familiarized ***403** himself with Lentek's financial structure or i n any way evaluated the impact this stock transfer would have on Lentek's operations. He did not act as if he represented the corporation in the stock transfer.

Moreover, the only two people able to hire lawyers on behalf of Lentek, Durek and Lentine, did not believe Blodig represented Lentek. The testimony of both Lentine and Durek on this point was consistent and clear. Lentine hired Blodig to represent his individual interests, not the interests of Lentek. Similarly, Durek testified that he hired Lee to represent his individual interests, not Lentek's interests. As the sole officers of Lentek, neither gentleman thought to hire separate legal representation for the company in this stock transfer, although Lentek likely needed separate counsel; neither gentleman had any reasonable, subjective belief that Blodig or Greenspoon Marder represented Lentek at any time in the transaction. Although these men may have breached their fiduciary duty in failing to get proper counsel for the company, the evidence is unrebutted that neither man hired a lawyer to represent Lentek. Certainly neither of them hired Greenspoon Marder or Mr. Blodig to represent Lentek.

In an attempt to demonstrate that the defendants represented Lentek, the plaintiff called two witnesses, Steven Lee, Durek's attorney, and Randa King, the former controller for Lentek, both of whom testified that they believed, for different reasons, that the defendants *did* represent Lentek in the stock transfer. With all due respect for these witnesses, their testimony regarding whether the defendants represented Lentek was irrelevant, as argued by the defendants at trial. Neither Lee nor King possessed any ability or authority to hire counsel for Lentek or to speak for Lentek. Notwithstanding, their testimony is summarized below.

Lee was retained by Durek to represent Durek individually in connection with Lentine's purchase of Durek's stock. (Plaintiff's Ex. No. 1, retainer agreement specifying Lee/Dean Mead represented Durek, individually; Plaintiff's Ex. No. 2, check to Dean Mead drawn on Durek's personal SunTrust account). Lee testified that he personally believed that Blodig/Greenspoon Marder represented Lentek based on Blodig's comments to the agreements related to the Stock Purchase Agreement signed only by Lentek, not Lentine in his individual capacity, and because Blodig was required to receive notice if Lentek defaulted in its obligations under the Stock Purchase Agreement. However, at no time did Lee have a conversation that would confirm his understanding that Blodig represented Lentek. Moreover, assuming Blodig indeed did hold himself out as a lawyer for Lentek, Lee's perception, even if accurate, is simply irrelevant. It is the subjective intent of the client, here either Lentine or Durek, which counts, not the opinion of Durek's lawyer.

Similarly, Ms. King's testimony as a former controller of Lentek is irrelevant. She was first employed at Lentek via a temporary agency in January, 2004, almost two years *after* the stock transfer occurred. She was permanently employed by Lentek in May 2004, in part to reconcile the company's 2002 financial data and to assist in preparing Lentek for an audit. During the course of her work, she came across $1.2 million in unclassified financial entries occurring in 2002, some of which were attributable to bills for legal services rendered by the defendants in connection with the stock transfer. Without dispute, Lentek paid for all of Lentine's individual legal expenses relating to the stock transfer. (Plaintiff's Ex. Nos. 6, 7, 8, 9 and 10). ***404** However, the company had not allocated those expenses prior to King's work in preparing for the upcoming audit. She merely reclassified these bills as corporate legal expenses for accounting purposes. Lentine never advised her that the expenses were for legal services rendered to him, personally, and not the company. Nor did Lentine tell King that she should issue a 1099 Form to him personally so that he could properly report the income for his own individual federal income tax purposes. The Court suspects that Lentine likely was trying to avoid these federal tax consequences. King merely was making a reasonable assumption that, because Lentek paid a lawyer, the legal services rendered were for the company. She had no personal knowledge either way, and, as such, her testimony is irrelevant.

As a final argument, the plaintiff argues that, at the very least, the defendants should be judicially estopped from denying that they represented Lentek in connection with the stock transaction because of the answers to interrogatories (Plaintiff's Ex. No. 24) Greenspoon Marder signed i n Adversary Proceeding 05–81, in which the plaintiff alleged Greenspoon Marder received actually or constructively fraudulent transfers when it accepted Lentek's payments for legal services rendered to Lentine individually. The issue whether Greenspoon Marder provided a reasonably equivalent value, or any value, to the debtor for the payments it received from Lentek will be addressed in the context of the plaintiff's fraudulent transfer claims in that separate adversary proceeding. Here, however, on the issue of attorney-client representation, the only relevant issue is whether the defendants' interrogatory answers should judicially estop them from denying that they represented Lentek. Specifically, Interrogatory Number 6 asks:

> Identify each person with any knowledge of the facts relevant to the issues in this adversary proceeding or to any Transfers and provide a general description of the facts and/or subject matter known by each such person.

In their Answer to Interrogatory Number 6, the defendants stated:

> Mr. Marder, Mr. Blodig, and Mr. Nordt rendered legal services which directly or indirectly benefited Lentek International, Inc.

Multiple other interrogatories (for example, Interrogatory Numbers 7, 8, 9, and 10) from the plaintiff directed the defendants to state why the transfers were not actually or constructively fraudulent under the Bankruptcy Code and Florida law. In response to those interrogatories, the defendants stated:

> "Lentek International, Inc., made payments to Greenspoon Marder who took the payments in good faith for legal services which directly or indirectly benefited Lentek International, Inc. Thus, there was no actual intent to hinder, delay, or defraud Lentek's creditors. Lentek did not receive less than a reasonably equivalent value in exchange for payment of GM's fees. Thus, there were no damages to Lentek International Inc.'s creditors as a result of its payment of attorney's fees to Greenspoon Marder. Moreover, pursuant to Lentek International, Inc.'s Amended and Restated By Laws adopted April, 2003, Lentek International, Inc., agreed to indemnify any officer or director, including Lou Lentine, or any former officer or director, to the full extent permitted by law. All documents responsive to this Interrogatory have been produced herewith in lieu of identifying the documents."

[8] **[9]** **[10]** The Eleventh Circuit Court of Appeals discussed judicial estoppel in *Parker* ***405** *v. Wendy's Intern'l, Inc.*, 365 F.3d 1268 (11th Cir.2004)[8] and in *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir.2002). "Judicial estoppel is an equitable doctrine invoked at a court's discretion" that precludes a party from asserting inconsistent claims in legal proceedings. *Burnes,* 291 F.3d at 1285–86 (*citing New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). Courts can invoke the doctrine "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions." *Burnes,* 291 at 1285–87 (*citing New Hampshire,* 532 U.S. at 749–50, 121 S.Ct. 1808; *American Nat'l Bank of Jacksonville v. Federal Dep. Ins. Corp.,* 710 F.2d 1528, 1536 (11th Cir.1983) ("judicial estoppel applies to the calculated assertion' of divergent positions")). The doctrine should not be invoked when the prior position was a result of inadvertence or good faith mistake. *Burnes,* 291 F.3d at 1285–87 (citations omitted).

[11] **[12]** While not an exact science, courts in the Eleventh Circuit generally consider two factors in determining whether to apply judicial estoppel to a particular case. *Parker,* 365 F.3d at 1271 (*citing New Hampshire,* 532 U.S. at 750, 121 S.Ct. 1808); *Burnes,* 291 F.3d at 1285 (*citing Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir.2001)). "First, it must be shown that the allegedly inconsistent positions were made under oath i n a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes,* 291 F.3d at 1285–86 (*citing Salomon,* 260 F.3d at 1308). These factors do not represent an exhaustive list. Instead, courts must consider all circumstances when determining whether to apply judicial estoppel. *Burnes,* 291 F.3d at 1286; *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. at 1815 (Noting that courts typically consider: (1) whether the present position is "clearly inconsistent" with the earlier position; (2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party).

[13] Judicial estoppel is not appropriate here. The defendants have not asserted divergent or inconsistent positions in the two adversary proceedings such as would make a mockery of the judicial system. Although the defendants stated that they accepted the payments "in good faith for legal services which directly or indirectly benefited Lentek," this is not equivalent to stating that they did, in fact, represent Lentek. Rather, they simply stated that value was rendered in exchange for the payments they received. I n addition, this Court has not accepted or relied on the defendants' assertion that Lentek received value for the exchange in any way. An example of where judicial estoppel *may* be appropriate in the context of the two adversary proceedings here is if, following this ruling, Greenspoon Marder changed its position and attempted to claim they *did* represent Lentek and, as a result, ***406** Lentek received something of value by way of their legal services. However, that is not what Greenspoon Marder has done to date. They merely have stated in interrogatory answers that Lentek "directly or indirectly" received some benefit from their services. This statement is not tantamount to professing that they represented Lentek in the stock transfer, and the Court finds no inconsistent position and certainly no statement calculated to make a mockery of the judicial system.

The test to determine whether the defendants represented Lentek is whether Lentek, through its authorized officers, Durek and Lentine, held a subjective, reasonable belief that the company hired the law firm. The unrebutted evidence is that neither man hired the defendants and that no attorney-

client relationship was established between the defendants and Lentek. The facts that some of the defendants' legal work pertained to Lentek, that the officers were focused on their own self-interest, and not on Lentek's interests, or that other third parties, such as Lee or King, believed the defendants represented Lentek, are irrelevant. Lentek had no attorney-client relationship with Greenspoon Marder or Mr. Blodig.

A status conference is scheduled for **October 25, 2007, at 10:00 a.m.** At that time, the parties can present their positions on the remaining actions needed to resolve these two related adversary proceedings i n light of this ruling. A separate order consistent with these findings of fact and conclusions of law shall be entered.

All Citations

377 B.R. 396, 48 Bankr.Ct.Dec. 285, 21 Fla. L. Weekly Fed. B 45

Footnotes

1 On April 18, 2007, the Court entered an Order (Adv. Pro. 05–190, Doc. No. 131) Consolidating Adversary Proceeding Nos. 05–190 and 05–81 for the purpose of resolving the factual issue of whether the defendants represented Lentek. The plaintiff filed Adversary Proceeding 05–81 against Greenspoon Marder alleging that Lentek paid Greenspoon Marder for legal services rendered to Lentine, personally, and that Lentek received no corresponding value for these payments. Therefore, the plaintiff seeks to recover the transfers/payments pursuant to Bankruptcy Code Sections 548, 550, and Florida Statute Sections 726.105 and 726.106. In Adversary Proceeding 05–190, the plaintiff again sued Greenspoon Marder, and additionally, Blodig. In that Complaint, the plaintiff alleges the defendants breached fiduciary duties owing to Lentek and committed professional malpractice and are liable pursuant to Bankruptcy Code Sections 541, 544, 548, 550, and Florida Statutes 726.105 and 726.106.

2 Michael Moecker was appointed as a liquidating trustee to gather assets for distribution to Lentek's creditors under the plan of reorganization confirmed by the Court on June 21, 2004 (Doc. No. 466). He has filed numerous adversary proceedings to collect assets in performance of his job, including these two related adversary proceedings.

3 Lentine allegedly financed his individual purchase of 225 shares of Lentek stock by using Lentek's assets. The sale price was approximately $2.4 million. Lentine later sold the same shares to RMS Limited Partnership (“RMS”) for $5,000,000, resulting in profits to Lentine personally of $2.6 million, perhaps with no corresponding benefit to Lentek or its creditors.

4 In this case, no retainer agreement was executed between Lentek and the defendants. However, Plaintiff's Exhibit No. 5 is a letter, dated October 10, 2002, from the defendants and addressed to Lentine, as president of Lentek, confirming their retention. The letter starts with “Dear Lou,” and then states “Thank you very much for retaining this firm *to assist you* in its present shareholder restructuring transactions.” (emphasis added). Although not the most clearly worded sentence, the Court finds the letter was intended to reflect that Mr. Blodig and Greenspoon Marder represented Lentine, personally, not Lentek, in Lentine's efforts to buy the corporation's stock.

5 In *Blackhawk,* similar to this case, the defendant/attorneys sought a summary judgment that the plaintiff's malpractice allegations failed because no attorney-client relationship existed. The District Court for the Middle District of Florida denied the motion for summary judgment, concluding that the plaintiff/client's “*intent* that the Defendants provide [certain] legal services establishes a sufficient attorney-client relationship between the parties to allow Plaintiff[ ] to pursue a claim for legal malpractice” where the defendants failed “to establish that Plaintiff lacked this *intent.*” 900 F.Supp. at 418. (emphasis added). Thus, summary judgment was denied because the defending attorneys could not prove an absence of intent. *Id.* In finding that a factual dispute existed concerning whether the defendants actually provided legal services to the plaintiff, the District Court referenced the definition of “client” supplied in Section 90.502(1)(b) of the Florida Evidence Code. However, the Court did not conclude that Section 90.502(1)(b) of the Florida Evidence Code supplied the test for finding an attorney-client relationship. Rather, citing *Dean,* 607 So.2d 494, the District Court stated that the “legal relationship [between the parties] depends on the intent of the client,' not on the actions of the lawyer.” 900 F.Supp. at 418. In *Blackhawk,* the critical fact was whether the plaintiff/client intended services to be rendered, not whether they were or were not, in fact, rendered.

6 In *In re Lawrence,* 217 B.R. 658, 664 (Bankr.S.D.Fla.1998), the Bankruptcy Court for the Southern District of Florida addressed whether a law firm had to be disqualified from representing a Chapter 7 trustee where the firm hired an attorney who had previously represented the debtor's mother. The court articulated a two pronged test for disqualification, which is not applicable here, and only tangentially addressed the test for demonstrating an attorney-client relationship, acknowledging that the test is “based in part upon the subjective belief [which must also be reasonable] that the client is

being represented by the attorney." 217 B.R. at 664 (*citing Bartholomew,* 611 So.2d at 86). The court did not elaborate upon or detail additional factors for consideration in determining whether an attorney-client relationship was present. The attorney-client relationship was discussed only because it constituted one of the two prongs of the test for disqualification.

7 The Stock Purchase Agreement also imposed substantial obligations upon Lentek and, by its own terms, was "duly and validly executed and delivered by the Purchaser [Lentine] and the Corporation [Lentek] and constitutes the legal, valid and binding obligation of the Purchaser and the Corporation, enforceable in accordance with its terms." (Plaintiff's Ex. No. 19, p. 5, ¶ 5(b)). Among other things, the Stock Purchase Agreement specified that Lentek would pay Durek's health insurance for 18 months following the closing of the Agreement (p. 8, ¶ 7(e)), that Lentek would purchase a van owned by Durek and would assume the debt on the van (p. 8, ¶ 7(f)), that Lentek would transfer to Durek the office and computer equipment in Durek's office as additional compensation to Durek (p. 8, ¶ 7(g)), and that Durek would be repaid the sum of $80,492.96 he had earlier loaned to Lentek (p. 9, ¶ 7(h)).

8 In *Parker,* the Eleventh Circuit Court of Appeals declined to invoke the doctrine to preclude a Chapter 7 trustee from pursuing an employment discrimination claim that the debtor initially failed to disclose as an asset on her bankruptcy schedules. 365 F.3d at 1269. The Court ruled that the claim was an asset of the debtor's bankruptcy estate and that the trustee, as the real party in interest, should not be estopped from pursuing the claim since the trustee had not asserted divergent or inconsistent positions in any legal proceedings.

134 So.3d 484
District Court of Appeal of Florida,
Fifth District.

Robert DINGLE and Janet L. Dingle, Appellants,
v.
Jacqueline C. DELLINGER, et al., Appellees.

No. 5D13–1725.
|
Feb. 7, 2014.
|
As Corrected on Denial of Rehearing Feb. 27, 2014.

Synopsis

Background: Grantees brought action against grantor's agent's attorney and attorney's law firm, alleging claims for legal malpractice, vicarious liability, and negligent training and supervision arising from attorney's alleged failure to draft enforceable quitclaim deed gifting real property from grantor to grantees. Attorney and firm moved to dismiss. The Circuit Court, Sumter County, William H. Hallman, III, J., granted motion and dismissed action with prejudice. Grantees appealed.

Holdings: The Fifth District Court of Appeal, Orfinger, J., held that:

[1] complaint sufficiently alleged that grantees were intended third-party beneficiaries, and thus trial court committed reversible error in dismissing legal malpractice claim, and

[2] complaint alleged facts sufficient to sustain vicarious liability claim against firm as principal for acts of attorney.

Affirmed in part, reversed in part, and remanded.

West Headnotes (19)

[1] Appeal and Error
De novo review

Appellate court reviews de novo a trial court's order dismissing a complaint with prejudice.

2 Cases that cite this headnote

[2] Appeal and Error
Pleading

To determine the sufficiency of a pleading, an appellate court accepts as true all well-pled allegations of the complaint.

1 Cases that cite this headnote

[3] Attorney and Client
Elements of malpractice or negligence action in general

In order to properly state a cause of action against an attorney for professional negligence, a plaintiff must plead sufficient facts to establish three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of the client's loss.

[4] Attorney and Client
Duties and liabilities to adverse parties and to third persons

An attorney's liability for professional negligence is generally limited to clients with whom the attorney shares privity of contract.

2 Cases that cite this headnote

[5] Attorney and Client
In general; limitations

Because the party who retains an attorney is in privity with that attorney, that party may bring a negligence action for legal malpractice.

1 Cases that cite this headnote

[6] Attorney and Client
Duties and liabilities to adverse parties and to third persons

If the parties are not in privity, to bring a legal malpractice action, the plaintiff must be an intended third-party beneficiary of the lawyer's services.

3 Cases that cite this headnote

[7] **Contracts**
Grounds of action

To assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party.

5 Cases that cite this headnote

[8] **Contracts**
Agreement for Benefit of Third Person

A party is an intended beneficiary of a contract only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

3 Cases that cite this headnote

[9] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Although an intended third-party beneficiary may maintain a legal malpractice action in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is conceptually superfluous because the crux of the action must lie in tort, as there can be no recovery without negligence.

1 Cases that cite this headnote

[10] **Contracts**
Agreement for Benefit of Third Person

It is not necessary to name a third-party beneficiary in the contract; rather, the parties' pre- or post-contract actions may establish their intent to primarily and directly benefit a third party.

3 Cases that cite this headnote

[11] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Attorney and Client
In general; limitations

The privity of contract requirement for a legal malpractice claim has been relaxed most frequently in will-drafting situations, but the third-party intended beneficiary exception to the rule of privity is not limited to will-drafting cases.

1 Cases that cite this headnote

[12] **Negligence**
Privity

Although privity of contract may create a duty of care providing the basis for recovery in professional negligence, the lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.

[13] **Contracts**
Agreement for Benefit of Third Person

A person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract.

1 Cases that cite this headnote

[14] **Appeal and Error**
Amended Pleadings

Attorney and Client
Duties and liabilities to adverse parties and to third persons

Grantees' third amended complaint contained sufficient ultimate facts, which, if proved, showed that grantees were intended third-party beneficiaries of contract for legal representation between attorney and grantor's agent, and thus trial court committed reversible error in dismissing grantees' legal malpractice claim against attorney and attorney's law firm, in action arising from attorney's alleged failure to draft enforceable quitclaim deed gifting real property

from grantor to grantees; complaint asserted that primary intent of agent in hiring attorney was to directly benefit grantees, that neither agent nor grantor directly benefited from hiring attorney, and that agent or grantor's donative intent was frustrated by alleged negligence of attorney and firm in not preparing enforceable quitclaim deed as they were contracted to do.

[15] Attorney and Client

Duties and liabilities to adverse parties and to third persons

Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an inter vivos transfer of property.

[16] Attorney and Client

Duties and liabilities to adverse parties and to third persons

As a general rule, when a transaction involves two interests to be protected, an attorney employed by one of the parties to the transaction cannot be held responsible to other parties unless it is alleged and proved that the attorney committed some nonnegligent tort such as fraud or theft.

[17] Attorney and Client

Duties and liabilities to adverse parties and to third persons

An attorney owes a duty to a third party if the attorney was hired for the purpose of benefiting a third party.

[18] Attorney and Client

Duties and liabilities to adverse parties and to third persons

Because the intended benefit rule requires a specific intent to benefit a third party, an attorney is not liable to a third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another.

1 Cases that cite this headnote

[19] Attorney and Client

Liability of firm

Grantees' third amended complaint alleged facts sufficient to sustain vicarious liability claim against law firm as principal for acts of attorney, in action arising from attorney's alleged failure during her representation of grantor's agent to draft enforceable quitclaim deed gifting real property from grantor to grantees, where complaint alleged facts sufficient to sustain legal malpractice claim against attorney.

Attorneys and Law Firms

***486** Craig A. Brand, of The Brand Law Firm, P.A., Miami, for Appellants.

***487** Joseph M. Mason, Jr. and Carole Joy Barice, of McGee & Mason, P.A., Brooksville, for Appellee, Jacqueline C. Dellinger.

Ryan J. Millhorn, of The Millhorn Law Firm, The Villages, for Appellees, Michael Millhorn, Eric Millhorn and The Millhorn Law Firm, L.L.C.

Opinion

ORFINGER, J.

Robert and Janet Dingle appeal the dismissal with prejudice of their legal malpractice claims against attorney Jacqueline Dellinger and the Millhorn Law Firm, L.L.C. We affirm in part, reverse in part, and remand.

This suit arose out of the alleged failure of Dellinger to properly draft documents gifting property to the Dingles. According to the Dingles' third amended complaint, John P. Kyreakakis, the sole shareholder and agent of Whiteway Investments, Inc., a Panamanian corporation, retained Dellinger, an employee or agent of Millhorn, to prepare a quitclaim deed to gift a piece of real property from Whiteway to the Dingles. Kyreakakis provided Dellinger with an English translation of a power of attorney, originally drafted in Spanish in Panama, to evidence his authority to transfer Whiteway's property to the Dingles. Dellinger drafted and

recorded the quitclaim deed following its execution. Several months later, Kyreakakis died and his widow challenged the conveyance. Ultimately, this Court concluded that the power of attorney did not authorize Kyreakakis to make a gift on Whiteway's behalf and determined that the conveyance was invalid. *See Dingle v. Prikhdina,* 59 So.3d 326 (Fla. 5th DCA 2011). The Dingles then sued Dellinger and Millhorn, alleging legal malpractice. Dellinger and Millhorn moved to dismiss, arguing that because the Dingles were not parties to the attorney-client relationship, Millhorn and its employees or agents owed them no duty. The trial court agreed and, after several amendments, dismissed the Dingles' causes of action with prejudice.

[1] **[2]** **[3]** We review de novo a trial court's order dismissing a complaint with prejudice. *E.g., Wendler v. City of St. Augustine,* 108 So.3d 1141, 1143 (Fla. 5th DCA 2013). To determine the sufficiency of a pleading, we accept as true all well-pled allegations of the complaint. *Kinney v. Shinholser,* 663 So.2d 643, 645 (Fla. 5th DCA 1995). In order to properly state a cause of action against an attorney for professional negligence, a plaintiff must plead sufficient facts to establish three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of the client's loss. *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.,* 969 So.2d 962, 966 (Fla.2007); *Moscowitz v. Oldham,* 48 So.3d 136, 138 (Fla. 5th DCA 2010). In this case, the issue on appeal involves the second element—whether Dellinger and Millhorn owed any duty to the Dingles. While the Dingles concede no attorney/client relationship existed between them and either Dellinger or Millhorn, they claim that they were the intended third-party beneficiaries of the contract between Whiteway and its attorneys.

[4] **[5]** **[6]** **[7]** **[8]** **[9]** **[10]** An attorney's liability for professional negligence is generally limited to clients with whom the attorney shares privity of contract. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So.2d 1378, 1379 (Fla.1993). Because the party who retains an attorney is in privity with that attorney, that party may bring a negligence action for legal malpractice. *Angel, Cohen & Rogovin v. Oberon Inv., N.V.,* 512 So.2d 192, 194 (Fla.1987). If the parties are not in privity, to bring a legal malpractice action, the plaintiff must be an intended third-party beneficiary ***488** of the lawyer's services. *See Espinosa,* 612 So.2d at 1380. To assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party.[1] *See, e.g., Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.,* 647 So.2d 1028, 1031 (Fla. 4th DCA 1994). A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong. *See id.; see also Jenne v. Church & Tower, Inc.,* 814 So.2d 522, 524 (Fla. 4th DCA 2002) (explaining that courts look to nature or terms of contract to find parties' clear or manifest intent that it is for third party's benefit). Thus, it is not necessary that the third-party beneficiary is named in the contract. *See Fla. Power & Light Co. v. Mid–Valley, Inc.,* 763 F.2d 1316, 1321 (11th Cir.1985). Rather, the parties' pre- or post-contract actions may establish their intent. *Id.*

[11] **[12]** **[13]** The privity requirement has been relaxed most frequently in will drafting situations, but "the third party intended beneficiary exception to the rule of privity is not limited to will drafting cases." *Hodge v. Cichon,* 78 So.3d 719, 722 (Fla. 5th DCA), *review denied,* 99 So.3d 942 (Fla.2012); *Winston v. Brogan,* 844 F.Supp. 753, 756 (S.D.Fla.1994) (citing *Greenberg v. Mahoney Adams & Criser, P.A.,* 614 So.2d 604, 605 (Fla. 1st DCA 1993)). Although privity of contract may create a duty of care providing the basis for recovery in negligence, the lack of privity does not necessarily foreclose liability if a duty of care is otherwise established. *See Baskerville–Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n,* 581 So.2d 1301, 1303 (Fla.1991). Still, "[a] person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract." *Taylor Woodrow Homes Fla., Inc. v. 4/46–A Corp.,* 850 So.2d 536, 543–44 (Fla. 5th DCA 2003) (quoting *Caretta Trucking,* 647 So.2d at 1030–31); *see Hunt Ridge at Tall Pines, Inc. v. Hall,* 760 So.2d 399, 400 (Fla. 2d DCA 2000) ("To find the requisite intent, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party.").

In a case very similar to the one before us, the Iowa Supreme Court held that a third party, alleging legal malpractice in preparation of donative nontestamentary instruments of conveyance, could assert a claim for legal malpractice by establishing that the donor specifically identified the third party as the object of the donor's intent and that the third party's expectancy was lost or diminished as a result of the lawyer's professional negligence. *Holsapple v. McGrath,* 521

N.W.2d 711 (Iowa 1994). In so holding, the Iowa Supreme Court wrote:

> [W]e note[ ] two basic problems with recognizing third-party suits against lawyers: without the privity requirement, parties to a contract for legal services could easily lose control over their agreement. In addition, the imposition of a duty to the general public could ***489** expose lawyers to a virtually unlimited potential for liability.
>
> On the other hand, we note[ ] the policy consideration supporting such a claim, primarily giving effect to the intent of the testator to transfer the property.
>
> ....
>
> In deciding whether to recognize such a claim, we look to ... the desirability of effecting the grantor's intent, the general policy of providing a remedy for a loss, and the need for an effective deterrent to future negligence. These concerns are as pertinent in a nontestamentary context as they [are in a testamentary context].
>
> On the other hand, the dangers inherent in an overbroad recognition of liability are as real in this case as they are in a testamentary disposition case, and any recognition of a claim in these circumstances must be tempered accordingly. Primarily, we must be concerned that such a claim be so circumscribed as not to "expose lawyers to a virtually unlimited potential for liability." *See [Schreiner v. Scoville,* 410 N.W.2d 679,] 681 [(Iowa 1987)].
>
> *Schreiner* required, in order to limit the scope of recognizable third-party plaintiffs, that a plaintiff be a "specifically identifiable" beneficiary "as expressed in the testator's testamentary instruments." *Id.* at 682. Thus, more than an unrealized expectation of benefits must be shown; a plaintiff must show that the testator (or here, the grantor) attempted to put the donative wishes into effect and failed to do so only because of the intervening negligence of a lawyer ....
>
> Second, under *Schreiner,* "a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence ... the [benefit] is ... lost, [in whole or in part]." *Id.* at 683....
>
> Interpolating the requirements for a cause of action to the circumstances of this case, we hold that a plaintiff must establish that (1) the plaintiff was specifically identified, by the donor, as an object of the grantor's intent; and (2) the expectancy was lost or diminished as a result of professional negligence.

Id. at 713–14 (internal citations omitted); *see Speedee Oil Change No. 2, Inc. v. Nat'l Union Fire Ins. Co.,* 444 So.2d 1304 (4th Cir.1984) (holding that corporation, as intended third-party beneficiary of promoter's contract with attorney, could sue attorney based on incorrect advice to promoters as attorney understood that legal advice was intended for use and benefit of corporation, and that corporation, rather than individual promoters, would act upon advice); *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan,* 494 N.W.2d 261, 266 (Minn.1992) (explaining that intended third-party beneficiary may bring action for legal malpractice where client's sole purpose is to benefit third party directly, and attorney's negligent act caused beneficiary to suffer loss; determination is matter of balancing extent to which transaction was intended to affect beneficiary, foreseeability of harm to beneficiary, degree of certainty that beneficiary suffered injury, closeness of connection between attorneys' conduct and injury, and policy of preventing future harm); *see also Red River Valley Bank v. Home Ins. Co.,* 607 So.2d 892, 896 (La.App.Ct.1992) (indicating that attorney may be liable for malpractice to third-party beneficiary of attorney's work); *Onita Pac. Corp. v. Trs. of Bronson,* 315 Or. 149, 843 P.2d 890, 896–97 (1992) (en banc) (ruling that attorney owes duty not only to client but also to intended beneficiaries of work done for client).

***490** **[14]** We conclude that the Dingles' third amended complaint makes allegations sufficient to bring it within this narrow exception to the privity requirement in legal malpractice cases. The Dingles' third amended complaint contains sufficient ultimate facts, which, if proved, show that they were the intended beneficiaries of Whiteway's contract with Dellinger and Millhorn. The Dingles' third amended complaint asserts that the primary intent of Whiteway in hiring Millhorn was to directly benefit them. Accepting, without finding, the complaint's allegations as true, there was no direct benefit to Whiteway or Kyreakakis, making this transaction similar to a gift or devise made in a trust or in a will. Whiteway or Kyreakakis's intent was frustrated by the alleged negligence of Dellinger and Millhorn in not preparing an enforceable quitclaim deed as they were contracted to do.[2] *See First Fla. Bank, N.A. v. Max Mitchell & Co.,* 558 So.2d 9, 15 (Fla.1990) (holding accounting firm could be liable for negligence to persons whom it knows and intends will rely on its opinions); *Rosenstone v. Satchell,* 560 So.2d 1229, 1230 (Fla. 4th DCA 1990) (explaining that attorney

may be held liable for breach of duties to one who he knows is intended beneficiary of legal services); *Admiral Merchs.,* 494 N.W.2d at 266 ("[A]n intended third-party beneficiary may bring an action for legal malpractice in those situations when the client's sole purpose is to benefit the third party directly, and the attorney's negligent act caused the beneficiary to suffer a loss."); *see also Donahue v. Shughart, Thomson & Kilroy, P.C.,* 900 S.W.2d 624, 625 (Mo.1995) (holding that beneficiaries of trust have standing to sue settlor's attorney for malpractice because attorney did not effectuate his client's wishes for transfer of property).

Still, Dellinger insists that she did not have a duty of care to the Dingles because the requirement of privity in attorney malpractice actions has only been relaxed where there is only one "side" to a transaction (e.g., wills, trusts, estate planning and adoptions), and this case involved a two-sided real estate transaction. Thus, Dellinger contends that because she was employed by Whiteway, she could not ethically represent the Dingles' interests or be held responsible to them.

[15] **[16]** **[17]** **[18]** Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an *inter vivos* transfer of property. *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.,* 467 So.2d 315, 317 (Fla. 3d DCA 1985). Courts usually reject the contention that the attorney for a seller, buyer, lender, or mortgagor owed a duty to another party. Thus, as a general rule, when a transaction involves two interests to be protected, an attorney employed by one of the parties to the transaction cannot be held responsible to other parties unless it is alleged and proved that the attorney committed some nonnegligent tort such as fraud or theft. *See, e.g., Adams v. Chenowith,* 349 So.2d 230, 231 (Fla. 4th DCA 1977). As the court in *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.,* 367 So.2d 633, 635 (Fla. 2d DCA 1979), explained:

> Just as in *Adams,* there was more than one 'side' of the transaction before us. The law firm's obligation ran to its client. There is no suggestion that the buyer was harmed by any type of fraudulent conduct. It may be that in transactions such as this the buyer often chooses to rely on the expertise of the lender's lawyer on the premise that the lawyer would not approve the title for the loan unless the title were clear. ***491** However, this is a calculated risk, and if it proves to be unfounded, the buyer has no claim that the lawyer violates a duty owed to him. To hold otherwise would place the lawyer in an untenable position, particularly when it is well known that lawyers will often pass certain title defects when examining a title for a loan but refuse to do so when representing a purchaser.

While the general rule in Florida is that an attorney owes a duty of care only to his client and not to third parties, an attorney owes a duty to a third party if the attorney was hired for the purpose of benefitting a third party. *See, e.g., Espinosa,* 612 So.2d at 1379–80; *Oberon,* 512 So.2d at 194. Because the intended benefit rule requires the specific intent to benefit the third party, it is accepted that an attorney is not liable to the third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another. *Wild v. Trans World Airlines, Inc.,* 14 S.W.3d 166, 168 (Mo.App.Ct.2000); *Donahue v. Shughart, Thomson & Kilroy, P.C.,* 900 S.W.2d 624, 625 (Mo.1995); *Onita,* 843 P.2d at 897.

This case involved a real estate transaction, typically a two-sided transaction. However, here, based on the allegations contained in the complaint, there was no adversarial relationship or differing interests to be protected, as the Dingles' interests were not in conflict with Whiteway or Kyreakakis, thus suggesting a one-sided transaction. *See generally Freedom Mortg. Corp. v. Burnham Mortg., Inc.,* 720 F.Supp.2d 978 (N.D.Ill.2010) (holding that mortgage lender sufficiently pled that primary purpose and intent of attorney's representation of mortgage broker and title insurer were to influence lender, giving rise to duty of care running from attorney to lender, as third-party beneficiary of attorney-client relationship; although broker and title insurer hired attorney as closing agent presumably to act in their best interests, attorney's work was nonadversarial as to lender in sense that attorney's services as closing agent were typically relied upon by all parties to real estate transaction); *Kirby v. Chester,* 174 Ga.App. 881, 331 S.E.2d 915 (1985) (concluding that closing attorney owed duty to nonclient lender that relied on attorney's title certification to loan money); *Flaherty v. Weinberg,* 303 Md. 116, 492 A.2d 618, 629–30 (1985) (determining that unrepresented

mortgagor-buyer's complaint, which alleged that mortgagee-lender retained attorney to intentionally benefit both parties, who had identical interests in the property, alleged sufficient facts to survive dismissal); 4 *Legal Malpractice* § 34:4 (2013 ed.) ("The rule of privity of contract prevails where a nonclient sues the attorney for errors in handling a transfer of property interests, in creating a security interest, searching title or representing a client in the transaction, who is sued by another party to the transaction.") (collecting cases); *see also Jimerson v. First Am. Title Ins. Co.,* 989 P.2d 258, 261 (Colo.App.1999) (explaining that professional supplier of information may be liable for its negligence to person with whom it has no contractual relationship, providing that supplier of information knows that recipient of information will provide it to that person or knows that information is to be used to influence transaction); *Stuart v. Freiberg,* 142 Conn.App. 684, 69 A.3d 320 (2013) (holding that genuine issue of material fact existed as to whether estate beneficiaries were intended beneficiaries of accountant's work for estate executor, and therefore, whether accountant owed them duty of care, precluded summary judgment in professional malpractice claim against accountant).

***492** **[19]** The Dingles' claim of negligence against Millhorn as principals for the acts of their agent, Dellinger, depends upon the claim for professional negligence against Dellinger. As the Dingles have asserted a cause of action for professional negligence, they have alleged facts sufficient to sustain their vicarious liability claim. *See, e.g., Aetna Ins. Co. v. Holmes,* 59 Fla. 116, 52 So. 801, 802 (1910) ("The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal."). However, we affirm without discussion, the trial court's dismissal of the Dingles' negligent training and negligent supervision claim.

In summary, on the unique facts before this Court, we conclude the trial court erred in dismissing the professional negligence (count I), and the vicarious liability (count II), claims of the Dingles' third amended complaint. We reverse this matter for reinstatement of these causes of action. We affirm the dismissal of the negligent supervision and training (count III) claim.

AFFIRMED in part; REVERSED in part; REMANDED.

SAWAYA and EVANDER, JJ., concur.

All Citations

134 So.3d 484, 39 Fla. L. Weekly D322

Footnotes

1 Although an intended third-party beneficiary may maintain a legal malpractice action in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is conceptually superfluous because the crux of the action must lie in tort as there can be no recovery without negligence. *McAbee v. Edwards,* 340 So.2d 1167, 1169 (Fla. 4th DCA 1976).

2 Whether an enforceable deed could have been drafted has not been determined.

260 So.3d 363
District Court of Appeal of Florida, Third District.

Lauren NIEBURG and Neil Nieburg, Appellants,
v.
Eric W. SULZBERGER, et al., Appellees.

No. 3D16-1905
|
Opinion filed October 31, 2018

Synopsis

Background: Relatives of clients, relatives' mother and step-father, brought legal malpractice and breach of fiduciary duty action against attorneys and law firms that drafted the clients' estate and marriage documents. The Circuit Court, Miami-Dade County, Jerald Bagley, J., No. 11-37956, dismissed the complaint with prejudice. Relatives appealed.

Holdings: The District Court of Appeal held that:

[1] relatives were not third-party beneficiary's of the services performed by the attorneys and law firms, and

[2] trial court acted within its discretion by denying relatives' leave to amend pleadings upon dismissal of claims.

Affirmed.

West Headnotes (6)

[1] Attorney and Client
Elements of malpractice or negligence action in general

An attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract.

[2] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Exception to the general rule requiring privity of contract between the client and attorney for a legal malpractice claim is when the plaintiff is the intended third-party beneficiary of the services performed by the attorney.

[3] Contracts
Agreement for Benefit of Third Person

A party is an intended third-party beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

[4] Contracts
Agreement for Benefit of Third Person

To find the requisite intent to establish an intended third-party beneficiary, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party.

[5] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Relatives of clients, relatives' mother and step-father, were not third-party beneficiary's of the services performed by the attorneys and law firms in drafting client's estate and marriage documents, where the attorneys and law firm did not express an intent to primarily and directly benefit the relatives when they represented clients.

[6] Pretrial Procedure
Amendment or pleading over

Trial court acted within its discretion by denying relatives of clients' leave to amend pleadings upon dismissal of legal malpractice and breach of fiduciary duty claims against law firms and attorneys on allegations surrounding the drafting of clients' estate and marriage documents,

where any amendment would be futile with the underlying contracts not showing an intent by the law firms or attorneys to primarily or directly benefit the relatives.

***364** An Appeal from the Circuit Court for Miami-Dade County, Jerald Bagley, Judge. Lower Tribunal No. 11-37956

Attorneys and Law Firms

Broad and Cassel, and Barbara Viota-Sawisch, Adam G. Rabinowitz, and Joseph H. Picone (Fort Lauderdale), for appellants.

DLD Lawyers, and Pete L. DeMahy, Kenneth R. Drake, Coral Gables, and Richard N. Conforti, for appellee, Eric W. Sulzberger d/b/a Sulzberger and Sulzberger.

Boyd Richards Parker & Colonnelli, P.L., and W. Todd Boyd, Miami, and Gissell Jorge, for appellees Neal Sandberg and Simon, Schindler & Sandberg, LLP.

Carlton Fields Jorden Burt, P.A., and Charles M. Rosenberg, Naomi Berry, and Steven M. Blickensderfer, Miami, for appellees David Scully and Jack R. Loving, P.A.

Before LOGUE, LUCK and LINDSEY, JJ.

Opinion

PER CURIAM.

Lauren and Neil Nieburg appeal the trial court's order dismissing their first amended complaint with prejudice. We affirm.

The Nieburgs alleged that three attorneys and two law firms committed legal malpractice and breached fiduciary duties. Eric Sulzberger was alleged to have been negligent in drafting the Nieburgs' mother and stepfather's estate and marriage documents. Neal Sandberg and his firm were alleged to have been negligent in reviewing and advising the Nieburgs' mother to sign an ante-nuptial agreement. And David Scully and his firm were alleged to have been negligent in advising the Nieburgs' mother about, and letting the statute of limitations lapse on, contesting their stepfather's estate and trust.

[1] **[2]** **[3]** **[4]** In general, "[a]n attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract." Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1379 (Fla. 1993). "The exception to this general rule requiring privity of contract between the client and attorney is when the plaintiff is the intended third-party beneficiary of the services performed by the attorney." Driessen v. Univ. of Miami School of Law Children & Youth Law Clinic, No. 3D18-999, —— So.3d ——, ——, 2018 WL 4608760, at *1 (Fla. 3d DCA Sept. 26, 2018). "A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong." Dingle v. Dellinger, 134 So.3d 484, 488 (Fla. 5th DCA 2014). "To find the requisite intent, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party." Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399, 400 (Fla. 2d DCA 2000).

[5] Based on the complaint and the underlying contracts in the record, the attorneys ***365** and law firms did not clearly express an intent to primarily and directly benefit the Nieburgs when they represented the Nieburgs' mother and stepfather. At best, the Nieburgs were incidental beneficiaries, which is insufficient. See Dingle, 134 So.3d at 488 ("Still, a person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract." (quotation omitted)).

[6] The Nieburgs contend they should be allowed to amend their complaint, and normally they would be able to, but the trial court had the discretion to deny leave to amend where the "amendment would be futile." JVN Holdings, Inc. v. Am. Const. & Repairs, LLC, 185 So.3d 599, 601 (Fla. 3d DCA 2016) (quotation omitted). Here, the underlying contracts say what they say, and no amount of creative pleading can get around the fact that they do not evidence an intent to primarily and directly benefit the Nieburgs.

The trial court's order dismissing the Nieburgs' complaint with prejudice is affirmed.

Affirmed.

763 So.2d 1274
District Court of Appeal of Florida,
First District.

SILVER DUNES CONDOMINIUM OF DESTIN, INC. et al., Appellants,
v.
BEGGS AND LANE, Attorneys and Counselors at Law, and John Daniel, individually, Appellees.

No. 1D99–4494.
|
Aug. 14, 2000.

Synopsis
Twenty individual condominium unit owners filed action against law firm representing corporate condominium association alleging malpractice. The Circuit Court, Okaloosa County, Thomas T. Remington, J., granted summary judgment for law firm. Individual unit owners appealed. The District Court of Appeal held that unit owners were not apparent intended third-party beneficiaries of legal services contract between association and law firm.

Affirmed.

West Headnotes (3)

[1] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney's liability for negligence in the performance of his or her professional duties is generally limited to individuals or entities with whom the attorney shares privity of contract, but a narrow exception to this privity requirement exists for individuals or entities who can demonstrate that they were intended and apparent third-party beneficiaries of the legal services contract.

1 Cases that cite this headnote

[2] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Individual condominium unit owners were not apparent intended third-party beneficiaries of legal services contract between corporate condominium association and law firm, and thus unit owners could not bring malpractice suit against law firm, even though association was at all times acting on behalf of and for benefit of unit owners as fiduciary, where law firm was hired to represent association during process of rebuilding condominiums following hurricane, legal interests of association and unit owners were in conflict during law firm's representation of association, and as result of conflict, law firm threatened legal action against some unit owners, and other unit owners threatened legal action against association.

3 Cases that cite this headnote

[3] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Evidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client undercuts any claim that the legal services were undertaken for the express benefit of the claimed third-party beneficiary.

1 Cases that cite this headnote

Attorneys and Law Firms

***1274** Douglas L. Stowell and Stephen L. Spector, Tallahassee, for appellants.

Alan R. Horky of Fuller, Johnson & Farrell, P.A., Pensacola, and ***1275** Patrick J. Farrell of Fuller, Johnson & Farrell, P.A., Tallahassee, for appellees.

Opinion

PER CURIAM.

The issue in this case is whether the trial court should have concluded that appellants, 20 individual condominium

unit owners, were the intended third-party beneficiaries of a legal services contract between the corporate condominium association, Silver Dunes Condominium of Destin, Inc. (hereinafter "association"), and appellee John Daniel of the law firm of Beggs and Lane.[1] We conclude that the undisputed facts in this case demonstrate that the individual unit owners were not the intended third-party beneficiaries of the legal services contract between the association and its attorney. We, therefore, affirm the trial court's entry of summary judgment against the individual unit owners in this legal malpractice action.

The Silver Dunes Condominium complex, located in Destin, Florida, is comprised of five separate buildings: Buildings A, B, C, D, and the high-rise. The complex is operated, managed, and maintained by the association. The association is a nonprofit corporation. The owners of each individual unit of the complex are, as required by statute, shareholders of the corporate association. *See* § 718.111(1)(a), Fla. Stat. (1995). The affairs of the association are managed by a board of directors (hereinafter "board") elected from the membership/shareholders of the association. The officers of the association are elected by the board. The officers and directors of the association have a fiduciary relationship to the unit owners/shareholders. *See id.*

In October 1995, Hurricane Opal hit the Florida coastline near Destin causing substantial damage to many homes, businesses, and condominiums in the area including the Silver Dunes Condominium complex. Buildings B and C of the complex, situated closest to the coastline, were almost completely destroyed and were immediately condemned by the city of Destin. According to the Declaration of Condominium for the complex, the association was solely responsible for the reconstruction of the condemned units. In fact, under the Declaration of Condominium, the individual unit owners of those condemned units were prohibited from rebuilding their units.

Within a month of the hurricane, the association, through its board, hired appellee John Daniel of the law firm of Beggs and Lane to provide legal representation on all matters relating to the reconstruction and repair of the damaged and destroyed buildings in the complex. According to Melinda Bagley, the former president of the association, the board expressed to Daniel its obligation to rebuild the destroyed and damaged units efficiently and cost effectively. Ms. Bagley explained in an affidavit:

> At all times, our concern was for the rebuilding expenses incurred by the individual unit owners and lost use of the units by the individual unit owners. It was in furtherance of these concerns that the Association hired legal counsel to obtain legal assistance for Silver Dunes on rebuilding the damaged units and structures as quickly as possible in accordance with the applicable law.

According to Daniel, he did not represent the individual unit owners in any of their individual claims arising out of the destruction of their units because the interests of the unit owners often diverged from that of the association. Daniel knew, however, that the board had a fiduciary duty to all members of the association to rebuild the damaged structures as expeditiously as possible and to make the cost to all the owners as low as reasonably possible under the circumstances.

As the plans for reconstruction and repair proceeded, the board discovered that the insurance coverage maintained by the ***1276** association on the complex would be insufficient to rebuild the destroyed structures in accordance with current building code requirements. In response to the discovery of this insurance shortfall, the board and Daniel made plans for the reconstruction of Buildings B and C with additional units for sale to the public to generate income to offset the shortfall.

During the board's attempts to have the reconstruction plan with the additional units approved by the membership, Daniel wrote letters to some initially dissenting unit owners threatening legal action on behalf of the association if they did not change their vote. These unit owners ultimately voted in favor of the expansion plan. Two different groups of unit owners then later threatened their own legal action against the association in connection with the association's attempt to rebuild the destroyed units.

In their legal malpractice claim against appellees, appellants contend that Daniel provided erroneous legal advice to the board in connection with the reconstruction expansion plan, which led to a delay in the ultimate reconstruction of the destroyed units and a resulting loss in rental income to the

affected unit owners. Appellees contend that they owed no duty of care to appellants because no privity of contract existed between appellees and appellants, and appellants were not the intended third-party beneficiaries of the legal services contract between the association and appellees. The trial court entered summary judgment in favor of appellees as to the legal malpractice claims filed by appellants.

[1] **[2]** An attorney's liability for negligence in the performance of his or her professional duties is generally limited to individuals or entities with whom the attorney shares privity of contract. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So.2d 1378, 1379 (Fla.1993); *Angel, Cohen & Rogovin v. Oberon Inv., N.V.,* 512 So.2d 192, 194 (Fla.1987). A narrow exception to this privity requirement exists, however, for individuals or entities who can demonstrate that they were intended and apparent third-party beneficiaries of the legal services contract. *See Espinosa,* 612 So.2d at 1380; *Oberon,* 512 So.2d at 194. In this case, the individual unit owners argue that they were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees because the association was at all times acting on behalf of and for the benefit of the unit owners as their fiduciary. Appellees argue on the other hand that the fiduciary relationship between the association and the unit owners did not automatically establish that the legal services contract was intended to benefit the unit owners and that the record does not otherwise support a finding that the unit owners were the apparent intended third-party beneficiaries of the contract.

Given that the association is a closely held corporation, the outcome here is governed, at least in part, by the decision in *Brennan v. Ruffner,* 640 So.2d 143 (Fla. 4th DCA 1994). In *Brennan,* a shareholder of a closely held corporation filed a legal malpractice action against the corporation's attorney after the shareholder was involuntarily terminated as a shareholder and employee of the corporation pursuant to a shareholder's agreement prepared by the attorney. *See id.* at 145. In deciding that the trial court had properly entered final summary judgment in favor of the corporation's attorney, the fourth district held:

> Although never squarely decided in this state, we hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not ***1277** exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders.

Id. at 145–46 (footnote omitted). This decision undercuts appellants' argument that they were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees simply by virtue of the fact that the association had a fiduciary obligation to act in their best interests. *See Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 742 So.2d 381, 389 (Fla. 4th DCA 1999)(holding that "[a]n attorney who represents a corporation is 'not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually.' ").

[3] In light of the decision in *Brennan,* the trial court's entry of summary judgment in this case can only be deemed error if the record otherwise demonstrates that the unit owners were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees. Yet, the record here cannot support such a finding because it shows that the legal interests of the association and the individual unit owners were in conflict during appellees' representation of the association. Evidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client undercuts any claim that the legal services were undertaken for the express benefit of the

claimed third-party beneficiary. *See Oberon,* 512 So.2d at 194; *Brennan,* 640 So.2d at 146.

During his representation of the association, Daniel threatened legal action against some unit owners and other unit owners threatened their own legal action against the association, all in connection with the association's attempts to rebuild the damaged and destroyed structures of the complex. This court cannot conclude that Daniel was representing the legal interests of the individual unit owners while at the same time threatening to sue them on behalf of the association and while they were themselves threatening to sue the association for its actions during the reconstruction process.

We, therefore, conclude that the individual unit owners were not the apparent intended third-party beneficiaries of the legal services contract between the association and appellees. The trial court's final summary judgment entered in favor of appellees on the individual unit owners' claims of legal malpractice is affirmed.

BENTON and BROWNING, JJ., and SHIVERS, DOUGLASS B., Senior Judge, concur.

All Citations

763 So.2d 1274, 25 Fla. L. Weekly D1943

Footnotes

1 The association is not a party to this appeal.

902 So.2d 755
Supreme Court of Florida.

COWAN LIEBOWITZ &
LATMAN, P.C., et al., Petitioners,
v.
Donald KAPLAN, etc., Respondent.

No. SC03–59.
|
March 17, 2005.
|
Rehearing Denied May 10, 2005.

Synopsis

Background: Insolvent corporation executed assignment for benefit of creditors, and assignee brought legal malpractice suit against corporation's attorneys for failing to disclose in private placements that money raised was used for unsecured loans to chief executive officer (CEO). The Circuit Court, Miami-Dade County, Steve Levine, J., granted attorneys' motions to dismiss. Assignee appealed. The District Court of Appeal, Fletcher, J., 832 So.2d 138,reversed and remanded. Review was granted based on conflict of decisions.

[Holding:] The Supreme Court, Cantero, J., held that the malpractice claims were assignable.

Approved and remanded.

Lewis, J., concurred in result only and filed opinion.

West Headnotes (2)

[1] Assignments
For Tort

Legal malpractice claims against attorneys who had prepared private placement memoranda for sale of corporate shares were assignable; the attorneys produced the private placement memoranda knowing they would be distributed to the public and that potential investors would rely on them, they owed a duty to the public, and concerns for confidentiality did not apply.

16 Cases that cite this headnote

[2] Attorney and Client
Nature and term of office

Attorneys owed a duty to the public when advising corporation and preparing the private placement memoranda.

6 Cases that cite this headnote

Attorneys and Law Firms

***756** Laura Besvinick of Hogan and Hartson, LLP, Miami, FL on behalf of Cowan, Liebowitz and Latman, P.C.; Robert Michael Klein and Marlene S. Reiss of Stephens, Lynn, Klein, Lacava, Hoffman and Puya, Miami, FL on behalf of Stephen M. Rosenberg and James J. D'Esposito; Caryn Bellus of Kubicki Draper, P.A., Miami, FL on behalf of Franzino and Rosenberg, P.C.; and Deborah Poore Knight of Walton, Lantaff, Schroeder and Carson Corporate Center, Fort Lauderdale, FL on behalf of Marshall Platt, Marshall Douglas Platt, P.A., Jack B. Packer, P.A. and Packer and Platt, for Petitioner.

Steven E. Stark and David A. Friedman of Fowler White Burnett, P.A., Miami, FL, for Respondent.

Daniel S. Green of Ullman and Kurpiers, LLC and Tracy Raffles Gunn of Fowler, White, Boggs and Banker, P.A, Tampa, FL on behalf of Florida Defense Lawyers' Association and Paul Steven Singerman, Ilyse M. Homer and Paul A. Avron of Berger Singerman, P.A., Miami, FL on behalf of the Business Law Section of the Florida Bar, as Amici Curiae.

Opinion

CANTERO, J.

In this case, we decide whether a potential plaintiff may assign a legal malpractice claim involving the preparation of private placement memoranda. In two prior cases, we allowed the assignment of other types of claims, contrasting them to claims for legal malpractice, which we stated were *not* assignable. *See Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997) (permitting the assignment of claims

against an insurance agent); *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.,* 765 So.2d 36 (Fla.2000) (permitting the assignment of claims against an accountant conducting an independent audit). In the decision below, the Third District Court of Appeal permitted the assignment of a legal malpractice claim, analogizing an attorney preparing private placement memoranda to the accountant conducting an independent audit we described in *KPMG. See Kaplan v. Cowan Liebowitz & Latman, P.C.,* 832 So.2d 138, 140 (Fla. 3d DCA 2002). That holding expressly and directly conflicts with our statements in *KPMG* and *Forgione* (albeit in dictum) implying a blanket prohibition against assignment of legal malpractice claims. Therefore, we accepted jurisdiction. *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 844 So.2d 645 (Fla.2003) (table); *see* art. V, § 3(b)(3), Fla. Const; *see also Watson Realty Corp. v. Quinn,* 452 So.2d 568, 569 (Fla.1984) (accepting jurisdiction based on conflict between the district court opinion and dictum in a prior Supreme Court case and receding from the dictum). For the reasons explained below, we approve the district court's decision. ***757** We agree that because lawyers preparing private placement memoranda, like independent auditors, owe a duty to those who rely on statements contained in their published documents, parties may assign claims for legal malpractice committed in preparing them. We therefore recede from the broad dicta in *KPMG* and *Forgione* purporting to prohibit the assignment of *all* legal malpractice claims. Nevertheless, we stress that the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client.

I. FACTS

Medical Research Industries, Inc. (MRI), a Florida corporation, developed and marketed homeopathic medical products. To raise money for capital improvements, MRI decided to issue a private placement of shares in the company. MRI's majority shareholder, William Tishman, consulted attorneys who prepared private placement memoranda. Through four private placements between 1996 and 1998, MRI raised over $50 million from about 2000 shareholders. Later, Tishman borrowed about $18 million in unsecured loans from MRI, leading to its eventual insolvency. MRI sued Tishman to recover the loan amount and obtained a judgment. Unable to satisfy the judgment, however, MRI executed an "Assignment for the Benefit of Creditors" to Donald Kaplan. [1] Kaplan then sued for legal malpractice the attorneys who prepared the private placement memoranda. The trial court granted the attorneys' motions to dismiss, concluding that legal malpractice claims are personal and not assignable and are exempt from levy and sale under an execution of assignment.

On appeal, the Third District reversed. It held that Kaplan had standing to bring the legal malpractice claims against the attorneys "[b]ecause the legal services at issue [were] not personal in nature but involved the publication of corporate information to third parties, i.e., the investors" and therefore "the policies underlying the prohibition of bare assignment of legal malpractice claims are inapplicable." *Kaplan,* 832 So.2d at 140. The district court relied on *KPMG's* holding that the relationship of a corporate client to an independent auditor does not implicate the same confidentiality concerns as the typical attorney-client relationship. *Id.; see KPMG,* 765 So.2d at 38. The court concluded that such concerns were not present in this case either, because the attorneys shared their information with third parties—i.e., shareholders and the investing public. The court also held that because Kaplan, as an assignee for the benefit of creditors, was charged with gathering and liquidating MRI's assets, "Kaplan is no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim." 832 So.2d at 140.

II. ANALYSIS

We agree with the district court that the public policy concerns with permitting the ***758** assignment of legal malpractice claims are substantially attenuated, if they exist at all, when attorneys prepare private (or public) placement memoranda. In such circumstances, attorneys act much as accountants do in performing independent audits. That is, they act not just for the corporation's benefit, but for the benefit of all those who rely on the representations in their documents—in this case, potential shareholders. Because we approve the district court's holding on this ground, we need not consider the court's alternative theory of assignability: that an assignee for the benefit of creditors is analogous to a bankruptcy trustee, to whom legal malpractice claims may be transferred. *See* 832 So.2d at 140; *In re Alvarez,* 224 F.3d 1273, 1279 (11th Cir.2000) (holding that a legal malpractice claim arising from bankruptcy counsel's alleged negligence was "property of the estate" under 11 U.S.C. 541(a)(1)).

Below we discuss (A) our previous cases addressing the assignability of legal malpractice claims; (B) the role and duties of attorneys preparing private placement memoranda;

and (C) why assignments of claims against attorneys involved in private placement memoranda do not implicate the public policy concerns generally associated with the assignment of legal malpractice claims.

A. *Forgione* and *KPMG*

As noted above, we previously have discussed the assignability of legal malpractice claims in two cases that did not involve such claims. In *Forgione,* we considered whether an insured could assign a claim for negligence against an insurance agent for failure to obtain proper coverage. 701 So.2d at 558. We said yes, reasoning that parties can assign causes of action derived from a contract or statute. *Id.* at 559. We compared the relationship between a prospective insured and an insurance agent with the attorney-client relationship. We noted that in contrast to the former relationship, the attorney-client relationship is confidential and personal and thus cannot be assigned: "Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.' " 701 So.2d at 559 (quoting *Washington v. Fireman's Fund Ins. Co.,* 459 So.2d 1148, 1149 (Fla. 4th DCA 1984)).

Several years later, we permitted the assignment of a claim against an independent auditor for professional malpractice in preparing an audit. *See KPMG,* 765 So.2d at 39. As in *Forgione,* we noted that legal malpractice claims are not assignable "because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client." *KPMG,* 765 So.2d at 38. We found that unlike an attorney, who must zealously represent a client in an adversarial setting, "an independent auditor who is hired to give an opinion on a client's financial statements must do so with an independent impartiality which contemplates reliance upon the audit by interests other than the entity upon which the audit is performed." *Id.* We distinguished the public policy reasons discussed in *Forgione* that prohibit assignment of legal malpractice claims because "[r]ather than acting as an advocate with an undivided duty of loyalty owed a client, an independent auditor performs a different function." 765 So.2d at 38.

B. Private Placement Memoranda

[1] We agree with the district court that the role of the attorneys in this case was similar to that of the independent auditors in *KPMG.* The claim is based on the attorneys' preparation of private placement memoranda and communications surrounding ***759** their production.[2] The memoranda disclosed information to MRI's shareholders and many potential investors. Like the independent auditors in *KPMG,* the attorneys intended that third parties would rely on the representations made in the memoranda. The legal services at issue, therefore, were not personal but involved publication of corporate information.

In a similar context, securities lawyers have been held to owe a duty to the public. In *Securities & Exchange Commission v. Spectrum, Ltd.,* 489 F.2d 535, 541–42 (2d Cir.1973), the Second Circuit held:

> The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.

See also Kline v. First W. Gov't Sec., Inc., 24 F.3d 480, 485–86 (3d Cir.1994) (concluding that "attorneys may be liable [to investors] for both misrepresentations and omissions where the result of either is to render an opinion letter materially inaccurate or incomplete"); *Felts v. Nat'l Account Sys. Ass'n, Inc.,* 469 F.Supp. 54, 67 (N.D.Miss.1978) ("The lawyer for the issuer plays a unique and pivotal role in the effective implementation of the securities laws. As a result, special duties are imposed on the lawyer.").

As these examples illustrate, lawyers often have public duties beyond those owed to the clients. The attorneys in this case produced the private placement memoranda knowing they would be distributed to the public and that potential investors would rely on them.

C. The Specter of a Market for Legal Malpractice Claims

The circumstances of this case do not implicate the public policy concerns behind the prohibition on assignment of legal malpractice claims. The majority of state courts considering this issue prohibit the assignment of legal malpractice claims, mostly based on public policy concerns.[3] ***760** *See Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865, 867 (Tenn.1996) ("Public policy is ... the primary consideration upon which courts from other jurisdictions have focused in determining the assignability of a legal malpractice action."); *Wagener v. McDonald,* 509 N.W.2d 188, 190 (Minn.Ct.App.1993) (same).

Courts are mainly concerned about creating a market for legal malpractice claims. As one California court noted:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty.... The commercial aspect of assignability of ... legal malpractice [actions] is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976); *see also Can Do, Inc.,* 922 S.W.2d at 869 (noting that "assignment of legal malpractice actions would both endanger the attorney-client relationship and commercialize legal malpractice lawsuits").

We expressed similar concerns in *KPMG* and *Forgione,* although much more superficially because those cases did not ***761** involve legal malpractice. *See KPMG,* 765 So.2d at 38 (noting that legal malpractice claims are not assignable because of the personal nature of legal services, involving a "confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client"); *Forgione,* 701 So.2d at 559 (noting that Florida law views legal malpractice as a personal tort that cannot be assigned because of the personal nature of legal services which involve highly confidential relationships).

[2] We reiterate these concerns. They continue to prevent the assignment of most legal malpractice claims. However, they do not arise in these circumstances. The claim MRI assigned to Kaplan does not involve personal services or implicate confidentiality concerns. As discussed above, the attorney's services for MRI involved publication of information to third parties. The attorneys owed a duty to the public when advising MRI and preparing the private placement memoranda.

With respect to confidentiality, this situation parallels that of securities lawyers claiming the attorney-client privilege in third-party suits based on inaccurate or misleading securities filings. The federal cases dealing with securities lawyers stress that information intended for release to third parties is not covered by the privilege. *See United States v.*

Moscony, 927 F.2d 742, 752 (3d Cir.1991) ("The ultimate key to determining confidentiality is intent ..."). *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir.1984), involved the disclosure of attorney-client communications about the creation of a prospectus intended for use in a private placement. Even though the prospectus was never released, the court held that the communications were not privileged because the information in the prospectus was intended for public release: "[c]ourts have consistently 'refused to apply the privilege to information that the client intends his attorney to impart to others ...,' or which the client intends shall be published or made known to others." *Id.* at 1356 (citing *United States v. Pipkins,* 528 F.2d 559, 563 (5th Cir.), *cert. denied,* 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976)); *see In re Micropro Sec. Litig.,* No. C–85–7428 EFL, 1988 WL 109973, at *2 (N.D.Cal.1988) (citing *In re Grand Jury Proceedings* and holding that preliminary drafts of public offering materials were not protected by the privilege because there was intent to disclose the information to third parties).

In this case, the documents the attorneys prepared not only were *intended* for release; they *were* released to third parties. Therefore, communications between MRI and the attorneys would not be protected in a third-party suit and concerns for confidentiality do not apply.

III. CONCLUSION

For the reasons stated, we approve the district court's holding that legal malpractice claims involving private placement memoranda may be assigned.[4] Because of our resolution of the case on this issue, we need not address the district court's alternative holding that the claims may be assigned because an assignee for the benefit of creditors is analogous to a trustee in bankruptcy, who can receive assignments of legal malpractice claims. *See* 832 So.2d at 140. The decision of the district court is approved and the case is remanded for ***762** further proceedings consistent with this opinion.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, QUINCE, and BELL, JJ., concur.

LEWIS, J., concurs in result only with an opinion.

LEWIS, J., concurring in result only.

While I concur in the result in this matter, I cannot subscribe to the broad reasoning employed by the majority and its unnecessary reliance on broad concepts of general assignability that I believe to be inapplicable to the instant matter. The question presented to the Court today can and should be resolved simply with the analysis and application of the governing statute—the Assignment for the Benefit of Creditors contained in Chapter 727 of the Florida Statutes. Giving effect to the plain meaning of that statute—as time-tested principles of statutory interpretation guide us to do, *see Holly v. Auld,* 450 So.2d 217 (Fla.1984)—permits the assignment of the legal malpractice claim at issue here. This Court need not and should not widen the scope of analysis to invoke principles that govern the discrete assignment of singular assets beyond the context of the Assignment for the Benefit of Creditors statute.

As the text of the Assignment for the Benefit of Creditors statute makes clear, the intent and purpose of the law is to "provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter." § 727.101, Fla. Stat. (2000). In almost all cases, the law is invoked in an overall liquidation, and does not apply in scenarios involving the assignment of single professional malpractice claims of the type at issue in *Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997), and *KPMG Peat Marwick v. National Union Fire Insurance Co.,* 765 So.2d 36 (Fla.2000). For that reason, *Forgione* and *KPMG* and the dicta therein discussing the general unassignability of legal malpractice claims are, in my view, completely inapposite in the present analysis.

Examination of the plain language of the Assignment for the Benefit of Creditors statute—the legal construct applicable here—makes clear the debtor's ability to assign legal malpractice claims in this limited context. Under the statute, the assignee for the benefit of creditors must "[c]ollect and reduce to money the assets of the estate, whether by suit in any court of competent jurisdiction or by public or private sale." § 727.108(1), Fla. Stat. (2000). The assignee for the benefit of creditors has the power to conduct the debtor's business, marshal and liquidate its assets, and receive its claims. *See* § 727.108(1), (4)-(5), Fla. Stat. (2000). It naturally follows that the assignee should also have the right to seek recovery against any third party that may be responsible for those claims as an asset of the debtor. Indeed, I agree with Kaplan in the assertion that the assignee for the benefit of

creditors cannot be made responsible for claims if he or she is not permitted to seek redress for damages from the responsible party on those claims. Concluding that a debtor may not assign a legal malpractice claim under the statute would clearly frustrate the intent of the law and the statutorily prescribed duties of the assignees.

Moreover, the statute clearly contemplates that a debtor's estate should include legal claims. According to the statute, the assets of the assignor include "claims and demands belonging to the assignor" without ***763** limitation. § 727.104(1)(b), Fla. Stat. (2000). In commencing a proceeding under the statute, the debtor must list items enumerated in the statute, including "claims, and choses in action." § 727.104(1)(d), Fla. Stat. (2000). Petitioners must fail in their contention that legal malpractice claims fall outside the ambit of the statute because the definition of "asset" explicitly excepts property "exempt by law from forced sale." § 727.103(1), Fla. Stat. (2000). Petitioners support their argument only with cases that assess the assignability of legal malpractice and personal tort claims generally, which, again, have no application in the present statutory context.

Kaplan acquired his interest in the legal malpractice claim along with all of MRI's other assets by operation of law. This is not a case governed by the general non-statutory concepts of assignability framing the debate in *Forgione* and *KPMG,* but by a specific statutory scheme governing the duties and liabilities of assignees for the benefit of creditors. Accordingly, I concur only with the result of the majority's decision today.

All Citations

902 So.2d 755, Blue Sky L. Rep. P 74,537, 30 Fla. L. Weekly S155

Footnotes

1 The assignment states:

> [The] Assignor, in consideration of the Assignee's acceptance of this Assignment, and for other good and valuable consideration, hereby grants, assigns, conveys, transfers, and sets over, unto the Assignee, his successors and assigns, all of its assets, except such assets as are exempt by law from levy and sale under an execution, including, but not limited to, all real property, fixtures, goods, stock, inventory, equipment, furniture, furnishings, accounts receivable, bank deposits, cash, promissory notes, cash value and proceeds of insurance policies, claims and demands belonging to the Assignor, wherever such assets may be located, hereinafter the "Estate", as which assets are to the best knowledge and belief of the Assignor, set forth on Schedule "B" annexed hereto.

2 The complaint alleges, among other things, that the attorneys published the private placement memoranda when they knew or should have known that the documents contained false and misleading information; included a "Use of Proceeds" section in the private placement memoranda indicating that the capital raised would be used to operate and expand MRI's business when the attorneys knew that a substantial amount of the money was being funneled into unsecured loans to Tishman; created a "loan program" under which Tishman could continually borrow substantial sums from MRI; continued participating in the "loan program" when the amounts loaned began reaching "irremediable levels"; and failed to advise or warn disinterested shareholders of the harmful and illegal loans to Tishman and thereby placed third party interests above that of MRI.

3 A majority of the states that have examined this issue, including Florida, have held that legal malpractice claims are generally not assignable. These include **Arizona,** *see Schroeder v. Hudgins,* 142 Ariz. 395, 690 P.2d 114, 118 (Ct.App.1984), *abrogation on other grounds recognized by Franko v. Mitchell,* 158 Ariz. 391, 762 P.2d 1345, 1353–54 n. 1 (Ct.App.1988); **California,** *see Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); **Colorado,** *see Roberts v. Holland & Hart,* 857 P.2d 492 (Colo.Ct.App.1993); **Connecticut,** *see Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves,* 709 F.Supp. 44 (D.Conn.1989); **Florida,** *see KPMG,* 765 So.2d at 36; *Forgione,* 701 So.2d at 557; **Illinois,** *see Brocato v. Prairie State Farmers Ins. Ass'n,* 166 Ill.App.3d 986, 117 Ill.Dec. 849, 520 N.E.2d 1200 (1998); **Indiana,** *see Picadilly, Inc. v. Raikos,* 582 N.E.2d 338 (Ind.1991); **Kansas,** *see Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 250 Kan. 490, 827 P.2d 758 (1992); **Kentucky,** *see Coffey v. Jefferson County Bd. of Educ.,* 756 S.W.2d 155 (Ky.Ct.App.1988); **Michigan,** *see Joos v. Drillock,* 127 Mich.App. 99, 338 N.W.2d 736 (1983); **Minnesota,** *see Wagener v. McDonald,* 509 N.W.2d 188 (Minn.Ct.App.1993); **Missouri,** *see Scarlett v. Barnes,* 121 B.R. 578 (W.D.Mo.1990); **Nebraska,** *see Earth Sci. Labs., Inc. v. Adkins & Wondra, P.C.,* 246 Neb. 798, 523 N.W.2d 254 (1994); **Nevada,** *see Chaffee v. Smith,* 98 Nev. 222, 645 P.2d 966 (1982); **New Jersey,** *see Alcman Servs. Corp. v. Samuel H. Bullock, P.C.,* 925 F.Supp. 252 (D.N.J.1996) *aff'd,* 124 F.3d 185 (3d Cir.1997); **Tennessee,** *see Can Do, Inc.*

Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865 (Tenn.), *cert. denied,* 519 U.S. 929, 117 S.Ct. 298, 136 L.Ed.2d 216 (1996); **Texas,** *see Britton v. Seale,* 81 F.3d 602 (5th Cir.1996); and **Virginia,** *see MNC Credit Corp. v. Sickels,* 255 Va. 314, 497 S.E.2d 331 (1998).

A minority of jurisdictions allow assignment of legal malpractice claims: the **District of Columbia,** *see Richter v. Analex Corp.,* 940 F.Supp. 353 (D.D.C.1996); **Maine,** *see Thurston v. Cont'l Cas. Co.,* 567 A.2d 922 (Me.1989); **Massachusetts,** *see New Hampshire Ins. Co., Inc. v. McCann,* 429 Mass. 202, 707 N.E.2d 332 (1999); **New York,** *see Vitale v. City of New York,* 183 A.D.2d 502, 583 N.Y.S.2d 445 (N.Y.App.Div.1992); **Oregon,** *see Gregory v. Lovlien,* 174 Or.App. 483, 26 P.3d 180 (2001); **Pennsylvania,** *see Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357 (Pa.1988); and **Rhode Island,** *see Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057 (R.I.1999).

4 We also approve the district court's holding that the claim in this case is not exempt from forced sale under section 727.104, Florida Statutes (2000), because, as discussed above, the claims in this case do not involve personal services or implicate the confidentiality concerns normally associated with the assignment of legal malpractice claims.

End of Document

969 So.2d 962
Supreme Court of Florida.

LAW OFFICE OF DAVID J. STERN, P.A., Petitioner,
v.
SECURITY NATIONAL SERVICING CORPORATION, Respondent.

No. SC06–361.
|
July 5, 2007.
|
Rehearing Denied Dec. 3, 2007.

Synopsis

Background: Assignee of loan brought malpractice action against attorney who was originally hired by a previous holder of loan, and who voluntarily dismissed a timely foreclosure action in favor of an untimely-filed action that was later dismissed on statute of limitations grounds. The Seventeenth Judicial Circuit Court, Broward County, Patti Englander Henning, J., awarded summary judgment to attorney. Assignee appealed. The District Court of Appeal, 916 So.2d 934,reversed and remanded. Attorney filed application for review.

Holdings: The Supreme Court, Bell, J., held that:

[1] assignee's attorney-client relationship with attorney did not give it standing to bring malpractice action based upon acts that occurred during attorney's representation of prior holder of note and mortgage, and

[2] policy concerns weighed against permitting assignment of legal malpractice claims arising in mortgage foreclosures.

Decision quashed.

Lewis, C.J., concurred in result only with an opinion.

Pariente, J., filed a dissenting opinion in which Quince, J., joined.

Quince, J., filed a dissenting opinion in which Pariente, J., joined.

West Headnotes (10)

[1] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Loan assignee's attorney-client relationship with attorney, which was formed during the appeal of the underlying foreclosure action, did not give assignee standing to bring a legal malpractice action based upon acts in foreclosing mortgage that occurred during attorney's representation of a prior holder of the note and mortgage.

[2] **Attorney and Client**
Elements of malpractice or negligence action in general

A legal malpractice action has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of loss to the client.

24 Cases that cite this headnote

[3] **Limitation of Actions**
Negligence in performance of professional services

For statute of limitations purposes, a cause of action for legal malpractice does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights; that is the first point at which there is a redressable harm.

3 Cases that cite this headnote

[4] **Attorney and Client**
Conduct of litigation

Until an underlying adverse judgment becomes final, a legal malpractice claim regarding that underlying action is hypothetical, and damages are speculative.

2 Cases that cite this headnote

[5] Attorney and Client

Elements of malpractice or negligence action in general

In stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship; the plaintiff must also allege that a relationship existed between the parties with respect to the acts or omissions upon which the malpractice claim is based.

9 Cases that cite this headnote

[6] Assignments

For Tort

Most legal malpractice claims are nonassignable.

2 Cases that cite this headnote

[7] Assignments

For Tort

Supreme Court would reject the minority, case-by-case approach of evaluating whether particular assignments of legal malpractice claims violated public policy concerns.

1 Cases that cite this headnote

[8] Mortgages and Deeds of Trust

Equities and Defenses Between Original Parties, Transfer as Subject to

Mortgages and Deeds of Trust

Rights and liabilities of transferor

Mortgages and Deeds of Trust

Rights of Transferee

Whereas the general assignment of a note and mortgage conveys to the assignee the rights of the assignor under the note and mortgage, subject to the equities and defenses of the obligor, such an assignment does not implicitly assign the attorney-client relationship between the assignor and his attorney.

4 Cases that cite this headnote

[9] Attorney and Client

Elements of malpractice or negligence action in general

The real basis and substance of a legal malpractice suit is a breach of the duties within the personal relationship between the attorney and client.

3 Cases that cite this headnote

[10] Assignments

For Tort

Policy concerns of protecting attorney-client confidences and preventing a market for legal malpractice claims weighed against permitting assignment of legal malpractice claims arising in mortgage foreclosures; Supreme Court would neither presume confidential information was not disclosed to assignee of loan nor find previous holder of loan impliedly waived attorney-client privilege when it conveyed note and mortgage by general assignment, and recognizing legal malpractice assignments under these circumstances would create incentive for both holders of impaired instruments and speculators to market these notes and mortgages with right to sue attorney in failed foreclosure action included as major factor in pricing transaction.

5 Cases that cite this headnote

Attorneys and Law Firms

***964** Robert M. Klein, Gregory S. Glasser, and Cayla B. Tenenbaum of Stephens, Lynn, Klein, et al., Miami, FL, for Petitioners.

Nancy W. Gregoire of Bunnell, Woulfe, Kirschbaum, Keller, McIntyre, Gregoire, and Klein, P.A., Fort Lauderdale, FL, for Respondents.

Opinion

BELL, J.

Law Office of David J. Stern, P.A. (Stern) seeks review of the Fourth District Court of Appeal's decision in *Security National Servicing Corp. v. Law Office of David J. Stern, P.A.,*

916 So.2d 934 (Fla. 4th DCA 2005), on the ground that it expressly and directly conflicts with three decisions of this Court, *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005), *KPMG Peat Marwick v. National Union Fire Insurance Co. of Pittsburgh, Pa.,* 765 So.2d 36 (Fla.2000), and *Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997). We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

This case involves a legal malpractice claim arising out of an attempted mortgage foreclosure. Briefly, Security National alleges that Stern committed legal malpractice by filing an untimely foreclosure action and by voluntarily dismissing a previously filed, timely foreclosure action on the same mortgage. This blunder apparently occurred because Stern, having realized its error in filing the untimely action, intended to dismiss it but instead dismissed the timely foreclosure action by mistake. Stern continued to prosecute the untimely foreclosure action, and the trial court entered summary judgment against it. Meanwhile, the mortgage and note were assigned several times before Security National finally acquired them during the appeal in the foreclosure action. Security National retained Stern as counsel to represent its interests in the appeal. Ultimately, the Second District affirmed the trial court's decision on appeal.

Subsequently, Security National brought a legal malpractice action against Stern, claiming to have standing either (1) by virtue of its attorney-client relationship with Stern or (2) as the assignee of the mortgage and note involved in the underlying foreclosure action. The trial court entered summary judgment against Security National, but the Fourth District reversed. The Fourth District held that Security National has standing to sue Stern as the assignee of the mortgage and note. *See Stern,* 916 So.2d at 939.

Now Stern seeks review by this Court of the Fourth District's decision. For the reasons stated, we conclude that Security National lacks standing to sue Stern for legal malpractice either by attorney-client relationship or by assignment. Therefore, we quash the decision below.

FACTUAL AND PROCEDURAL BACKGROUND

The Fourth District described the facts of this case as follows:

> This legal malpractice action arises out of a botched mortgage foreclosure. Security ***965** National is the transferee of the underlying note and mortgage....
>
> ... In 1997, the holder of the note and mortgage, UMLIC–SIX CORP., timely filed a mortgage foreclosure action. While that action was pending, UMLIC–SIX assigned the loan to EMC Mortgage. EMC hired Stern to foreclose the loan. Stern filed a second foreclosure action on the same note and mortgage on December 15, 1998. By this time, the statute of limitations had already expired, so that this 1998 foreclosure action was untimely.
>
> On February 19, 1999, Stern substituted as counsel in the timely 1997 foreclosure suit, then five days later voluntarily dismissed that timely action, leaving only the untimely action intact. Stern essentially admits that this was malpractice.
>
> On August 27, 1999, EMC assigned the loan to Universal Portfolio Buyers, Inc. (Universal). Stern continued on as Universal's counsel in the untimely 1998 action. On October 15, 1999, Universal assigned the loan to North American Mortgage Co. (North American). Stern remained as North American's counsel in the 1998 action.
>
> On July 24, 2000, the owner of the encumbered property moved for summary judgment on statute of limitations grounds. On November 5, 2000, the trial court entered summary judgment for the defendant. North American appealed.
>
> On April 30, 2001, while the appeal was pending, North American assigned the loan to Security National. The record does not reflect whether there was consideration for this transfer or whether Security National had knowledge of the status of the foreclosure at the time. Thereafter, Stern remained as counsel representing Security National, but only for a month or two.
>
> On December 7, 2001, the second district affirmed the final judgment. [On November 5, 2002,] Security National ... brought this legal malpractice action against Stern. The complaint alleges negligence in dismissing the timely 1997 action (at the time EMC owned the loan) and in failing to timely move to reinstate the 1997 action until after the motion for summary judgment was filed (potentially spanning the ownership of EMC, Universal, and North American).

> Although the trial court stated in her order that she "may take issue with the fairness of such ruling," she felt bound to enter summary judgment on Stern's behalf because there was no attorney-client relationship between Stern and Security National "at the time the cause of action accrued."

Stern, 916 So.2d at 936 (citation omitted). On appeal, the Fourth District reversed, holding that under this Court's decision in *Kaplan,* Security National received a valid assignment of the legal malpractice claim against Stern. The Fourth District reasoned that "the malpractice action was transferred incident to the transfer of the note and mortgage," *Stern,* 916 So.2d at 936, and that the assignment in question did not implicate relevant policy concerns against legal malpractice assignments. *See id.* at 938–39.

On February 16, 2006, Stern filed a notice to invoke this Court's discretionary jurisdiction. Stern claims that the Fourth District misapplied and improperly extended our holding in *Kaplan,* which was expressly limited to the particular facts of that case. Stern argues that Security National does not have standing either (1) by its attorney-client relationship with Stern or (2) by an implied general assignment of the malpractice claim. We address both of ***966** these issues in turn. As stated earlier, we ultimately determine that Security National does not have standing to sue Stern for the legal malpractice it alleges.

STANDING BY ATTORNEY–CLIENT RELATIONSHIP

[1] [2] [3] [4] [5] The Fourth District properly concluded that Security National's attorney-client relationship with Stern did not give it standing to bring a legal malpractice action based upon acts that occurred during Stern's representation of a prior holder of the note and mortgage. As the Fourth District explained:

> A legal malpractice action has three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of loss to the client. *See Kates v. Robinson,* 786 So.2d 61, 64 (Fla. 4th DCA 2001). For statute of limitations purposes, a cause of action for legal malpractice does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights. *See Silvestrone v. Edell,* 721 So.2d 1173, 1175 n. 2 (Fla.1998). That is the first point at which there is a redressable harm. *Id.* at 1175. Until then, a malpractice claim is "hypothetical" and damages are "speculative." *Id.; see also Hold v. Manzini,* 736 So.2d 138, 142 (Fla. 3d DCA 1999) ("mere knowledge of possible malpractice is not dispositive of when a malpractice action accrues"). Security National points to this law and argues that because it owned the loan by the time the appeal was completed and the cause of action accrued, the law regarding the assignment of legal malpractice claims is irrelevant. Simply put, it claims that it was the owner of the loan at the critical point in time.

By contrast, Stern points to language from our decision in *Kates,* 786 So.2d at 64:

> In stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship. The plaintiff must also allege that a relationship existed between the parties with respect to the acts or omissions upon which the malpractice claim is based.

See also Maillard v. Dowdell, 528 So.2d 512 (Fla. 3d DCA 1988). These cases rejected attempts by former clients to retroactively expand the scope of the attorney's representation. While they are factually different, the basic point seems sound: the time of the alleged negligent act or omission is the critical point for testing the scope and existence of the attorney-client relationship.

Stern, 916 So.2d at 936–37. We agree with the Fourth District's conclusion. Security National did not gain standing to sue Stern for prior acts of legal malpractice by forming an attorney-client relationship with Stern during the appeal of the underlying foreclosure action. Therefore, we approve the Fourth District's conclusion on this issue. However, as explained below, we disagree with the Fourth District's extension of *Kaplan* into the context of general assignments of notes and mortgages.

STANDING BY ASSIGNMENT

We disapprove of the Fourth District's decision and conclude that Security National did not receive a valid assignment of the right to sue Stern for legal malpractice. First, in *Kaplan,* we did not adopt the minority, case-by-case approach regarding the assignment of legal malpractice claims. We continued to adhere to the majority view that legal malpractice claims are generally not assignable. Second, the Fourth District's reliance on *Kaplan* is ***967** further misplaced

because the facts in *Stern* are significantly different from those in *Kaplan.* Third, the relevant policy considerations in cases such as this weigh against recognizing the assignment of a legal malpractice claim in a general assignment of a note and mortgage. We address each of these reasons in order.

First, the Fourth District misinterpreted our holding in *Kaplan* as an abandonment of the majority view which generally prohibits legal malpractice assignments in favor of the minority, case-by-case approach, which permits all legal malpractice assignments that do not violate relevant policy principles. As we explained in *Kaplan,* "[a] majority of the states that have examined this issue, including Florida, have held that legal malpractice claims are generally not assignable.... A minority of jurisdictions allows assignment of legal malpractice claims[.]" 902 So.2d at 759 n. 3; *see also KPMG,* 765 So.2d at 38 ("[L]egal malpractice claims are not assignable because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client."); *Forgione,* 701 So.2d at 559 (quoting *Washington v. Fireman's Fund Ins. Co.,* 459 So.2d 1148, 1149 (Fla. 4th DCA 1984) ("Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.' ")). The Fourth District read *Kaplan* as follows:

> The significance of *Kaplan* is not a narrow point pertaining to the attorney-client privilege, but rather the more broad view that *the door is now open to assignment of legal malpractice actions* in exceptional cases which do not fully implicate the core policy concerns underlying the general rule.

Stern, 916 So.2d at 938–39 (emphasis added). Contrary to the Fourth District's interpretation, the significance of *Kaplan* was indeed the narrow point pertaining to attorney-client privilege. *Kaplan* was not intended to proclaim that the door is now open to assignment of legal malpractice actions in exceptional cases.

Kaplan was the first and only case in which this Court permitted a limited exception to the general prohibition on legal malpractice assignments, and our holding was confined to the specific facts and circumstances of that case. Specifically, *Kaplan* involved the following facts:

> Medical Research Industries, Inc. (MRI), a Florida corporation, developed and marketed homeopathic medical products. To raise money for capital improvements, MRI decided to issue a private placement of shares in the company. MRI's majority shareholder, William Tishman, consulted attorneys who prepared private placement memoranda. Through four private placements between 1996 and 1998, MRI raised over $50 million from about 2000 shareholders. Later, Tishman borrowed about $18 million in unsecured loans from MRI, leading to its eventual insolvency. MRI sued Tishman to recover the loan amount and obtained a judgment. Unable to satisfy the judgment, however, MRI executed an "Assignment for the Benefit of Creditors" to Donald Kaplan. Kaplan then sued for legal malpractice the attorneys who prepared the private placement memoranda. The trial court granted the attorneys' motions to dismiss, concluding that legal malpractice claims are personal and not assignable and are exempt from levy and sale under an execution of assignment.

902 So.2d at 757 (footnote omitted). The trial court dismissed the action, concluding that legal malpractice actions are not assignable. ***968** On appeal, the Third District reversed, holding that the legal services at issue in *Kaplan* were not personal in nature but rather involved the publication of corporate information to third parties. Subsequently, we approved the Third District's holding and receded from "broad dicta" in *Forgione* and *KPMG,* which purported to prohibit the assignment of all legal malpractice claims. *See Kaplan,* 902 So.2d at 757; *see also KPMG,* 765 So.2d at 38; *Forgione,* 701 So.2d at 559. In reaching our conclusion, we compared lawyers preparing private placement memoranda to independent auditors (as in *KPMG*), and reasoned that both types of professionals owe professional duties to intended third parties who rely on the statements contained in their published documents. We permitted the assignment of the legal malpractice claim because the information prepared in *Kaplan* was intended for release to third parties, and, therefore, the assignment did not violate attorney-client confidentiality. However, we stressed that "the vast majority of legal malpractice claims remain unassignable *because in most cases the lawyer's duty is to the client.*" *Kaplan,* 902 So.2d at 757 (emphasis added).

[6] **[7]** Thus, in *Kaplan* we reaffirmed our adherence to the majority view that most legal malpractice claims are nonassignable. In so doing, we necessarily rejected the minority, case-by-case approach of evaluating whether particular assignments violate public policy concerns. We do so again in this case.

Second, we also disapprove of the Fourth District's reliance on *Kaplan* because the factual circumstances in *Stern* are not analogous to those in *Kaplan.* In *Kaplan,* "[t]he attorneys owed a duty to the public when advising MRI and preparing the private placement memoranda." *Kaplan,* 902 So.2d at 761. We explained that attorneys preparing private (or public) placement memoranda "act not just for the corporation's *benefit,* but for the *benefit* of all those who rely on the representations in their documents—in this case, potential shareholders." *Id.* at 758 (emphasis added). Unlike the attorneys in *Kaplan,* Stern did not perform legal work for EMC with the intention of directly benefiting Security National or any other third party. Indeed, at the time Stern filed the untimely 1998 foreclosure action and voluntarily dismissed the timely 1997 foreclosure action, the duty Stern owed was solely to its client at the time, EMC.

[8] **[9]** *Kaplan* also differs from *Stern* in that the assignment of the legal malpractice claim in *Kaplan* was *express,* whereas Security National asserts an *implied* assignment of the legal malpractice claim through the general assignment of the note and mortgage. We find that the right to bring an action against Stern for legal malpractice is not one of the rights Security National acquired when it purchased the note and mortgage by general assignment. First, we note:

> As a general rule, the assignee of a nonnegotiable instrument takes it with all the rights of the assignor, and subject to all the equities and defenses of the debtor connected with or growing out of the obligation that the obligor had against the assignor at the time of the assignment.

State v. Family Bank of Hallandale, 667 So.2d 257, 259 (Fla. 1st DCA 1995) (citing *Dickerson, Inc. v. Federal Deposit Ins. Corp.,* 244 So.2d 748, 749 (Fla. 1st DCA 1971); *Guaranty Mortgage & Ins. Co. v. Harris,* 182 So.2d 450, 453 (Fla. 1st DCA), *rev'd on other grounds,* 193 So.2d 1 (Fla.1966)); *see also Rose v. Teitler,* 736 So.2d 122 (Fla. 4th DCA 1999). Whereas the general assignment of a note and mortgage ***969** conveys to the assignee the rights of the assignor under the note and mortgage (subject to the equities and defenses of the obligor), such an assignment does not implicitly assign the attorney-client relationship between the assignor and his attorney. As we have stressed before, " 'the real basis and substance of the malpractice suit' is a *breach of the duties within the personal relationship* between the attorney and client." *Forgione,* 701 So.2d at 559 (emphasis added) (quoting *Christison v. Jones,* 83 Ill.App.3d 334, 39 Ill.Dec. 560, 405 N.E.2d 8, 10 (1980)).

In *Stern,* the legal malpractice claim arose from the personal attorney-client relationship established when EMC hired Stern to enforce its rights under the note and mortgage. This attorney-client relationship was not inherent in those instruments themselves. In other words, the right to sue for legal malpractice is not "connected with or growing out of" the relationship between the mortgagor and mortgagee; rather, the legal malpractice claim is connected to and grows out of the separately established relationship between the attorney and the client. *See Family Bank of Hallandale,* 667 So.2d at 259.

[10] Third, we disapprove of the Fourth District's decision below because the relevant policy concerns weigh against permitting legal malpractice assignments. As we noted in *Kaplan,* the following passage from California's Second District Court of Appeal well explains the policies against legal malpractice assignments:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal

> duty.... The commercial aspect of assignability of ... legal malpractice [actions] is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Kaplan, 902 So.2d at 760 (quoting *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976)). In essence, the two major policy concerns justifying a general prohibition against the assignment of legal malpractice claims are (1) protecting attorney-client confidences and (2) preventing a market for legal malpractice claims. The Fourth District determined that these policy concerns were not present in *Stern.*

As to the first policy concern, the Fourth District reasoned that "[t]he case ... does not involve personal services. It also seems unlikely that EMC or North American shared privileged information ***970** with Stern." *See Stern,* 916 So.2d at 938. Given the complete absence of any record support for this reasoning, it is rather speculative. We are unwilling to presume that Stern's relationships with EMC and North American did not involve personal services or that confidential information was not disclosed. Likewise, we also are unwilling to determine, as the Fourth District necessarily did, that EMC impliedly waived the attorney-client privilege when it conveyed the note and mortgage by general assignment. *See id.* at 938. Finding such an implied waiver in the general assignment of a note and mortgage would permit numerous unforeseen assignees downstream to have access to the original assignor's confidential information and would expose the assignor's attorney to virtually limitless liability to parties with whom the attorney never owed a professional duty. *See Kaplan,* 902 So.2d at 760 (citing *Goodley,* 133 Cal.Rptr. at 87).

We also disagree with the Fourth District's conclusion that permitting legal malpractice assignments in this context would not tend to create a marketplace for legal malpractice claims. To the contrary, this is precisely the type of transaction that our precedent warns against. *See Kaplan,* 902 So.2d at 760; *KPMG,* 765 So.2d at 38; *Forgione,* 701 So.2d at 559. Recognizing legal malpractice assignments under these circumstances would create an incentive for both holders of such impaired instruments and speculators to market these notes and mortgages with the right to sue the attorney in the failed foreclosure action included as a major factor in pricing the transaction. As stated earlier, this would expose attorneys to liability to parties who had no connection to the underlying foreclosure action, "never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty." *Kaplan,* 902 So.2d at 760 (quoting *Goodley,* 133 Cal.Rptr. at 87). Permitting such a market to arise would create an "undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* (quoting *Goodley,* 133 Cal.Rptr. at 87).

In short, the assignment of legal malpractice claims that arise in mortgage foreclosures violates the two policy concerns underlying the general prohibition against such assignment.

CONCLUSION

For the reasons expressed above, we quash the Fourth District's decision and hold that Security National does not have standing to bring an action against Stern for legal malpractice either through an attorney-client relationship or by general assignment.

It is so ordered.

WELLS, ANSTEAD, and CANTERO, JJ., concur.

LEWIS, C.J., concurs in result only with an opinion.

PARIENTE, J., dissents with an opinion, in which QUINCE, J., concurs.

QUINCE, J., dissents with an opinion, in which PARIENTE, J., concurs.

LEWIS, C.J., concurring in result only.

I respectfully disagree with the holding of the majority that the assignment of the legal malpractice claim in the instant matter was not permissible under our previous decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005). Although I dissented in *Kaplan* and disagree with the analysis it presents, it is ***971** now the law of Florida. I am of the opinion that the Fourth District below correctly followed *Kaplan* and concluded that the assignment was permissible under the reasoning of this Court in *Kaplan. See Sec. Nat'l Servicing Corp. v. Law Office of David J. Stern, P.A.,* 916 So.2d 934, 938 (Fla. 4th DCA 2006). Therefore, I concur in result only based on my continued belief, as expressed in my concurring in result only opinion in *Kaplan,* that the decision of this Court in *Kaplan* was overly broad and violated the long-standing principle in this State that legal malpractice claims are not assignable. *See Kaplan,* 902 So.2d at 762 (Lewis, J., concurring in result only) ("I cannot subscribe to the broad reasoning employed by the majority and its unnecessary reliance on broad concepts of general assignability that I believe to be inapplicable to the instant matter.").

Contrary to the assertions of the majority, the decision of this Court in *Kaplan* was not "confined to the specific facts and circumstances of that case." Majority op. at 967. Instead, the *Kaplan* decision established factors to be applied to permit the assignment of legal malpractice claims in situations where the legal services provided by the attorney are not personal in nature and therefore do not involve any confidential communications that would trigger the policy concern of protecting the attorney-client privilege, which generally justifies the prohibition against the assignment of legal malpractice claims. *See Kaplan,* 902 So.2d at 761 n. 4 (permitting the assignment of a legal malpractice claim where "[t]he claim[ ] ... [does] not involve personal services or implicate ... confidentiality concerns"). It is now too late for this Court to close the proverbial barn door by asserting that the *Kaplan* decision was limited only to the specific facts presented in that case without receding from that decision.

In the instant matter, as in *Kaplan,* the legal services provided were not personal in nature. *See id.* at 759. A mortgage foreclosure action requires only that the claimant be the owner and holder of the note and mortgage and that the mortgagee has defaulted on that note and mortgage. *See Chemical Residential Mortgage v. Rector,* 742 So.2d 300, 300 (Fla. 1st DCA 1998). In such actions, an attorney's duty is to the client only to the extent that the client is the owner and holder of the note and mortgage. The benefit or detriment of any actions taken by the attorney with regard to the foreclosure will clearly flow to any subsequent holders, and, accordingly, subsequent holders should be permitted to hold the attorney accountable for malpractice with regard to the foreclosure action if the *Kaplan* analytical factors are applied. Similar to the preparation of the private placement memoranda in *Kaplan,* an attorney filing a foreclosure action acts for the benefit of not only the present client, but also any subsequent holder of the mortgage and note, who will rely on the representations contained in those documents.

Additionally, upon application of the underlying principles of *Kaplan,* the policy concerns that generally militate against permitting the assignment of legal malpractice claims are not present in the instant matter. As noted above, a foreclosure action requires only the mortgage and note, as well as a determination of whether the mortgagee has defaulted. *See Chemical,* 742 So.2d at 300. There is absolutely no reason to believe or assume that an attorney undertaking such an action will obtain confidential information from a client that would be protected under the attorney-client privilege. The assertion of the majority that the Fourth District's position that no attorney-client privileged information with regard to the foreclosure action was shared with Stern during his ***972** representation is "speculative," majority op. at 970, is simply not substantiated with any supporting evidence, nor is it supported by the reality of the information that is required to file a foreclosure action. Similarly, the majority's assertion that to permit the malpractice claim in the instant matter would create a marketplace for legal malpractice claims, *see* majority op. at 970, the other asserted policy concern against allowing such assignments, is also unsubstantiated by any reasoning or evidence. Even permitting the assignment in actions such as the instant matter, an attorney's duty in foreclosure actions would be far from unbounded because it would be limited to the present and any subsequent holders of

the note and mortgage. The *Kaplan* factors are either valid or invalid and we should strive for stability.

Finally, the majority's attempt to distinguish the instant matter from *Kaplan* based on the fact that the assignment in *Kaplan* was express, whereas in the instant matter the assignment was implied, is a distinction without legal significance. In Florida, unless a writing is required by statute, an assignment can be implied. *See* 3A Fla. Jur.2d *Assignments* § 18 (2006). Florida also recognizes the right to freely assign common law and statutory rights unless such an assignment offends public policy concerns. *See VOSR Indus., Inc. v. Martin Props., Inc.,* 919 So.2d 554, 556 (Fla. 4th DCA 2005). Contrary to the assertion of the majority that the assignment in the instant matter would have constituted an impermissible assignment of the attorney-client relationship, *see* majority op. at 969, allowing the assigned malpractice claim to proceed would not have implicated any attorney-client confidentiality concerns because the legal services in the instant matter were not personal in nature. Therefore, there were no public policy concerns that would prevent the assignment.

In conclusion, the Fourth District below correctly applied the factors established by this Court in *Kaplan* and determined that the assignment in the instant matter was permitted under the reasoning of our earlier decision there. The legal services in the instant matter were not personal in nature and did not implicate confidentiality concerns. However, I concur in result only based on my continued objection to the broad reasoning employed by the majority of this Court in *Kaplan,* which has opened the door to the assignment of legal malpractice claims in potentially countless other contexts. We should either recede from *Kaplan* or apply the underlying factors used to support the *Kaplan* decision.

PARIENTE, J., dissenting.

I agree with Justice Quince's dissent and would approve the well-reasoned decision of the Fourth District in this case. The Fourth District followed our decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005), in which we prohibited the assignment of *most* legal malpractice claims. Chief Justice Lewis correctly observes that the Fourth District's reasoning and ultimate result in this case is clearly permissible under our analysis in *Kaplan* because the claim is not personal in nature and none of the other public policy concerns that justify prohibiting the assignment of legal malpractice claims is present. *See* concurring in result only op. at 971. Although Chief Justice Lewis is correct that we opened the door in *Kaplan,* it is my view that this door was neither unwisely opened nor does it now need to be closed.

I would follow the sound reasoning of those jurisdictions that have allowed "the assignment of a claim for malpractice that is part of a general assignment in a commercial setting and transaction that encompasses ***973** a panoply of other assigned rights, duties, and obligations." *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057, 1060 (R.I.1999). As astutely observed by the Massachusetts Supreme Court, the policy reasons justifying a blanket prohibition against the assignment of legal malpractice claims are in part based "on outmoded concepts and protectionism," such as the fear of "open trading" of legal malpractice claims. *N.H. Ins. Co. v. McCann,* 429 Mass. 202, 707 N.E.2d 332, 337 (1999).

Further, as expressed by both of these courts, the attorney-client privilege is a non-issue given the commercial and transactional circumstances of these types of cases because the assignment operates as a waiver of any attorney-client privilege. *See id.; Cerberus Partners,* 728 A.2d at 1060. In fact, in rejecting the attorney-client privilege public policy concern as a basis for prohibiting the assignment of malpractice claims, the Supreme Court of Pennsylvania concluded: "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected." *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357, 359 (1988). I believe there is great wisdom in the analyses of these courts.

The facts of this case highlight why allowing the assignment of this type of legal malpractice claim violates no conceivable public policy. Here, the act of malpractice occurred in 1999 when attorney Stern voluntarily dismissed the timely 1997 foreclosure action, leaving only the untimely 1998 foreclosure action intact. At the time, EMC Mortgage Corporation held the mortgage. However, based on our decision in *Perez–Abreu, Zamora & De La Fe, P.A. v. Taracido,* 790 So.2d 1051 (Fla.2001), EMC could not bring a legal malpractice claim at that time because the cause of action did not accrue "until the conclusion of the ... underlying judicial proceeding." *Id.* at 1055. Thus, the legal malpractice cause of action in this case did not accrue until 2001, when the Second District affirmed the final judgment holding that the mortgage foreclosure case was barred by the statute of limitations. By then the mortgage had been

assigned from EMC to Universal Portfolio Buyers, Inc., to North American Mortgage Company, and finally to Security National Servicing Corporation. Instead of working at cross purposes, all of these entities cooperated with Stern, the original lawyer who admitted to the legal malpractice, in an attempt to eliminate the harm caused by the malpractice through the litigation process.

Frankly, it would be difficult for an outside observer not to conclude that the perpetuation of a rule that prohibits the assignment of legal malpractice claims in this context serves only to protect a clearly negligent attorney at the expense of the mortgage holders, who were engaged in legitimate commercial transactions. For these reasons, I must respectfully dissent.

QUINCE, J., concurs.

QUINCE, J., dissenting.

I do not agree with the majority that the assignment of the legal malpractice claim in this case would violate policy concerns which underlie the general prohibition against the assignment of legal malpractice actions. Therefore, I would approve the decision of the Fourth District Court of Appeal, which followed our decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005). In *Kaplan* we allowed the assignment of a legal malpractice claim finding that "[t]he claim MRI ***974** assigned to Kaplan does not involve personal services or implicate confidentiality concerns." *Kaplan,* 902 So.2d at 761. The same is true in this case. In addition, I do not believe that concerns about the development of a market for legal malpractice claims outweigh the rights of the parties in this claim to their access to the courts for redress.

I agree with the majority that *Kaplan* is not an abandonment of Florida's general prohibition against the assignment of legal malpractice claims. Instead, in *Kaplan* we said in no uncertain terms that "most" or the "vast majority" of legal malpractice claims continue to be unassignable. This Court in *Kaplan* cited the prior cases from this Court that have addressed the assignability issue. We noted that in *Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997), *receded from on other grounds by Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 757 (Fla.2005), a case that did not involve a legal malpractice issue, we said legal malpractice claims generally involve personal service and issues of confidentiality which preclude assignment. We reiterated the position in *KPMG Peat Marwick v. National Union Fire Insurance Co.,* 765 So.2d 36 (Fla.2000), *receded from on other grounds by Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 757 (Fla.2005), another case that did not involve a legal malpractice issue, that legal malpractice claims were generally not assignable because of the personal nature of the service rendered. With those principles in mind, we examined the nature of the services rendered by the lawyers in *Kaplan* and concluded that the services were more in the nature of the independent auditor that was examined in *KPMG.* Moreover, we examined the notion that the assignment of legal malpractice claims would result in the creation of a market for these claims that would not bode well for the legal profession. And while we continued to express our concerns in these policy areas, we nonetheless found that the claim in *Kaplan,* the legal malpractice claim, was assignable.

As in *Kaplan,* neither the nature of the services nor the policy concerns require the nonassignability of the legal malpractice claim involved in this case. The majority is unwilling to presume that the law firm's representation in this case did not involve personal services or the disclosure of confidential information. As the Fourth District pointed out, the underlying service in this case is a botched mortgage foreclosure. The plaintiff in the malpractice action, Security National, is the transferee of the note and mortgage that was the subject of the foreclosure action. The law office, on the other hand, represented all of the holders of the note and mortgage beginning with EMC Mortgage. EMC, after getting an assignment of the note, asked the law firm to foreclose the loan. While the action was pending, EMC assigned the loan to Universal Portfolio Buyers, who in turn assigned the loan to North American Mortgage Company. While an appeal from the grant of summary judgment in favor of the property owner was pending, North American assigned the loan to Security. The Law Office of David J. Stern, P.A. continued to represent each entity in this chain of assignments. It is Stern's seamless, uninterrupted representation of EMC, Universal, North American, and Security in this matter that demonstrates that this type of representation for a commercial transaction lacks the unique and personal duties that characterize the typical malpractice claim that might be imperiled if we allowed the general assignment of legal malpractice claims.

The very nature of the mortgage industry itself further demonstrates a lack of unique and personal duties that often characterize ***975** confidential relationships. The sale of mortgage loans is a very common transaction in this country. Average homebuyers are aware that their mortgages are likely

to be sold to a new mortgagee at any time. It is more likely than not that as a member of an industry in which selling mortgages is an everyday occurrence, EMC was aware that the same information given to its attorney in this foreclosure action would necessarily flow to any assignee purchasing the note and mortgage while the action was still pending.

If Stern, as attorney for a company in the business of acquiring then selling mortgage loans, was concerned about confidentiality, he could have advised his client, EMC Mortgage, or his subsequent client, Universal Portfolio Buyers, or his subsequent client, North American Mortgage, of their ability to not assign any potential malpractice claim if they opted to sell the mortgage. There would be no imperilment of the sanctity of the relationship between an attorney and a client when that client is advised that any information divulged to the attorney can readily be kept confidential if the client values confidentiality more than the ability to assign the claim. Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem,* 82 Tex. L.Rev. 481, 500 (2003).

As to our public policy concern that we want to prevent creating a market for legal malpractice claims, I agree with the Fourth District that these concerns are more apparent when the legal representation and assignment occur in a non-commercial setting. *See Security Nat'l Serv. Corp. v. Law Office of David J. Stern, P.A.,* 916 So.2d 934, 937 (Fla. 4th DCA 2006) (quoting from *Kaplan* the California case of *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976)). In the instant case it is an important distinction that we do not have the mere purchase of a malpractice claim, we have a commercial assignment of the lender's original agreement. The malpractice claim was not transferred to economic bidders who have never had a professional relationship with Stern. The malpractice cause of action did not accrue until December 2001, by which time Stern had established a professional relationship with Security National; clearly he is not defending himself against strangers. *Stern,* 916 So.2d at 936.

I also do not believe that the assignment of the malpractice claim here would encourage an unjustified lawsuit against Stern or promote champerty, [1] two additional concerns noted by the majority. The record indicates that Stern botched this foreclosure and that National Security held the mortgage and note on the property when the judgment resulting from Stern's negligence became final. It was at this point that National Security was precluded from recovering on its note and mortgage. *Id.* This malpractice claim is thus meritorious and there is no encouragement of an unjustified lawsuit. It is not unjust to require Stern to compensate the holder of the mortgage that, because of his legal malpractice, is now unable to claim the property used to secure the mortgage.

Champerty requires a party unrelated to the lawsuit to form an agreement with a litigant in the suit to help pursue the litigant's claim in consideration for receiving part of the judgment. *Black's Law Dictionary* 246 (8th ed.2004). This is clearly not ***976** the situation here. The origin of this policy concern was the *Goodley* court, which was deciding the case in 1976 based on a claim for malpractice arising out of a divorce proceeding. *See Goodley* 133 Cal.Rptr. 83. The *Goodley* court was rightly concerned in a situation where a legal malpractice action was bought and brought by a stranger to a divorce action. Thirty years after *Goodley,* we should not be deciding a case in which the parties are operating in a commercial setting with the assignment of a commercial instrument on the same principal considerations used in a very personal divorce setting.

The majority also believes that allowing the assignment under these circumstances would create an incentive for both holders of mortgages and speculators to include the right to sue an attorney in failed foreclosures as a factor increasing the marketability of the mortgage. This seems highly speculative, and as one commentator notes:

> Legal malpractice claims are very suspect. Many more claims end in defeat rather [than] victory. Such claims are quite often vigorously contested.... [B]ecause a rational buyer-assignee of any such claim will expect a stiff fight at the courthouse, a stable, routine market for such claims is unlikely to develop.

Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem,* 82 Tex. L.Rev. 481, 495–96 (2003) (quoting Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims,* 37 S. Tex. L.Rev. 1203, 1215–16 (1996)). Malpractice suits are an expensive and lengthy process, and the outcome is never certain. It is unlikely that sophisticated business entities will

begin taking the extreme risk of purchasing mortgage notes solely to sue attorneys for malpractice. Narrowing our holding to allow claims to be brought only by assignees that have retained the attorney in question to represent them in the same matter further ensures that the majority's fear of a market for such claims will never be realized.

I would affirm the lower court's ruling and hold that pursuant to a commercial assignment, the assignee holding a commercial instrument at the time a cause of action accrues owns a legal malpractice claim if the attorney committing the alleged malpractice was retained by that current assignee in the same matter.

PARIENTE, J., concurs.

All Citations

969 So.2d 962, 32 Fla. L. Weekly S396

Footnotes

1 Defined in *Merriam–Webster's Collegiate Dictionary* (10th ed.) as “a proceeding by which a person not a party in a suit bargains to aid in or carry on its prosecution or defense in consideration of a share of the matter in suit.”

 KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Atkin v. Tittle & Tittle, Fla.App. 3 Dist., March 31, 1999

528 So.2d 512
District Court of Appeal of Florida,
Third District.

Eugene MAILLARD and Patricia Lynch, husband and wife, Appellants,
v.
Thomas J. DOWDELL, III, and Bonefish Towers Condominium Association, Appellees.

No. 87–2152.
|
July 19, 1988.

Synopsis
After condominium unit purchasers learned unit contained serious structural defects, purchasers brought action against defendants including condominium association and attorney who represented purchasers in purchasing the unit. The Circuit Court, Monroe County, David P. Kirwan, J., dismissed association and attorney for failure to state cause of action, and purchasers appealed. The District Court of Appeal, Hendry, J., held that: (1) purchasers could not recover from condominium association on theory association had fiduciary duty to prospective purchasers to disclose information which association possessed concerning defective condition of condominium building prior to sale; (2) association was not entitled to attorney fees under provision of declaration of condominium awarding costs and fees to prevailing party in any proceeding arising because of alleged failure of apartment owner or association to comply with terms of declaration, as purchasers were prospective purchasers when their cause of action accrued; and (3) purchasers did not have legal malpractice cause of action against attorney based on attorney's alleged negligence by failing to use proper diligence to ascertain exact nature of construction defects and acquaint himself with true underlying facts of litigation involving condominium association and developers and builders of condominium.

Affirmed.

Schwartz, Chief Judge, filed opinion dissenting in part.

West Headnotes (4)

[1] Common Interest Communities
Persons or entities that must comply

Condominium unit purchasers, who learned unit they had recently purchased contained serious structural defects, could not recover from condominium association on theory the association had fiduciary duty to prospective purchasers to disclose information which association possessed concerning defective condition of condominium building prior to sale of condominium unit, although statute provides that officers and directors of condominium association have fiduciary relationship to unit owners. West's F.S.A. § 718.111(1)(a).

2 Cases that cite this headnote

[2] Common Interest Communities
Costs and attorney fees

Condominium association, which condominium unit purchasers had sued after learning condominium unit they purchased contained serious structural defects, alleging that association had fiduciary duty to prospective purchasers to disclose information that association possessed concerning defective condition of condominium building prior to sale of unit, was not entitled to attorney fees under provision of declaration of condominium awarding costs and fees to prevailing party in any proceedings arising because of alleged failure of apartment owner or association to comply with terms of declaration; purchasers were prospective purchasers, not unit owners, at time their cause of action accrued, so contractual provision awarding attorney fees would be inapplicable to purchasers.

2 Cases that cite this headnote

[3] Attorney and Client
Pleading and evidence

To establish element of legal malpractice, employment of attorney, it is not sufficient

merely to assert attorney-client relationship existed between parties; it is essential to allege that relationship existed with respect to acts or omissions upon which malpractice claim is based.

20 Cases that cite this headnote

[4] Attorney and Client

Acts and omissions of attorney in general

Condominium unit purchasers did not have legal malpractice cause of action against attorney who represented purchasers in purchasing unit on theory attorney was negligent by failing to use proper diligence to ascertain exact nature of construction defects and acquaint himself with true underlying facts of litigation involving condominium association and developers and builders of condominium, litigation which condominium unit vendor allegedly told purchasers and attorney of prior to sale was pending; no allegations were made that attorney was instructed to do anything other than represent purchasers in purchasing property, and purchasers did not claim attorney completely disregarded matters coming to his attention which should reasonably have put him on notice that purchasers would have legal problems that were not precisely or totally within scope of task attorney was employed to perform.

12 Cases that cite this headnote

Attorneys and Law Firms

***513** Sutton, Jamerson & Mullin and John O. Sutton, Coral Gables, for appellants.

Thomas J. Dowdell, III, Franklin D. Greenman, Marathon, for appellees.

Before SCHWARTZ, C.J., and HENDRY and NESBITT, JJ.

Opinion

HENDRY, Judge.

Plaintiffs, Eugene Maillard and Patricia Lynch, upon learning the condominium unit they had recently purchased contained serious structural defects, brought a multi-count complaint against numerous defendants, including Bonefish Towers Condominium Association and Thomas J. Dowdell, the attorney who represented the plaintiffs in purchasing the condominium unit. The trial court entered orders of dismissal in favor of defendants Bonefish Condominium and Dowdell for failure to state a cause of action. Plaintiffs appealed.

[1] Count five of plaintiffs' complaint alleged that Bonefish Towers Condominium Association had a fiduciary duty to plaintiffs as prospective purchasers to disclose information the association possessed concerning the defective condition of the condominium building prior to the sale. Bonefish Towers filed a motion to dismiss, claiming the condominium association owed no duty of disclosure to plaintiffs as prospective ***514** purchasers. In granting the motion to dismiss the trial court found that the statutory duty of condominium associations to their unit owners, pursuant to section 718.111(1)(a), Florida Statutes (1985),[1] does not extend to prospective purchasers. After considering plaintiffs' arguments on appeal and finding them unpersuasive, we affirm the trial court's order of dismissal.

[2] Bonefish Towers further claims they are entitled to attorney's fees under a provision of the declaration of condominium which awards costs and fees to the prevailing party "in any proceeding arising because of an alleged failure of an apartment owner of the association to comply with the terms of the Declaration." We cannot accept this argument. When this cause of action accrued, plaintiffs were prospective purchasers and not unit owners; consequently, this was not a "proceeding arising because of an alleged failure of an apartment owner ... to comply with the terms of Declaration." The contractual provision awarding attorney's fees would be inapplicable to plaintiffs. *Turnberry Towers Corp. v. Mechoulam,* 425 So.2d 1180 (Fla. 3d DCA 1983); *Pacheco v. Lincoln Palace Condominium, Inc.,* 410 So.2d 573 (Fla. 3d DCA 1982).

We turn now to the legal malpractice count against attorney Dowdell. The seller of the condominium unit, the William Creasy Agency, Inc., allegedly told the plaintiffs and Dowdell prior to the sale that the condominium association was involved in litigation in Dade Circuit Court with the developers and builders of the condominium to recover the costs of repairing minor cosmetic defects. After the sale, the plaintiffs learned the true purpose of the litigation was to recover considerable damages for serious structural defects. In count four of their complaint, plaintiffs alleged Dowdell

was negligent in conducting his duties as an attorney in that he failed to use proper diligence to ascertain the exact nature of the construction defects and acquaint himself with the true underlying facts of the condominium action. The trial court granted Dowdell's motion to dismiss, finding the complaint:

> fails to allege facts which constitute legal malpractice in that an attorney employed as alleged, to represent the purchaser of the condominium parcel, has no duty to investigate structural defects or the content of the lawsuit filed by the Condominium Association in Dade County against developers, builders, and materialmen involving structural defects in the condominium improvements when the existence of the lawsuit had been made known to the purchaser and the attorney does not withhold any information known to him concerning the lawsuit, that was not already also known by or disclosed to the purchaser and the attorney was not hired specifically to look into the lawsuit or investigate the structure.

[3] In any legal malpractice suit the plaintiff is required to prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Maryland Casualty Co. v. Price,* 231 F. 397 (4th Cir.1916), as adopted in *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). In establishing the first element, the attorney's employment, it is not sufficient merely to assert an attorney-client relationship existed between the parties; it is essential to allege the relationship existed with respect to the acts or omissions upon which the malpractice claim is based. *Kurtenbach v. TeKippe,* 260 N.W.2d 53 (Iowa 1977). *See also Lawyers Professional Liability Ins. Co. v. McKenzie,* 470 So.2d 752 (Fla. 3d DCA 1985) (plaintiff had to prove attorney was hired for the specific purpose of getting back property and not merely recovering money owed); *Boyd v. Brett–Major,* 449 So.2d 952 (Fla. 3d DCA 1984) (attorney was hired to delay mortgage foreclosure action and not to win the case).

[4] In ruling on a motion to dismiss for failure to state a cause of action a court is ***515** bound in its consideration to the allegations found within the four corners of the complaint and must accept these allegations as true. *Copeland v. Celotex Corp.,* 447 So.2d 908 (Fla. 3d DCA 1984), *quashed on other grounds,* 471 So.2d 533 (Fla.1985); *Emile v. Florida Power & Light Co.,* 426 So.2d 1152 (Fla. 3d DCA 1983); *Dunnell v. Malone & Hyde, Inc.,* 425 So.2d 646 (Fla. 3d DCA 1983). The fundamental question a court must consider in ruling on a motion to dismiss is whether by proving the allegations in the complaint the plaintiff would establish a cause of action against the defendant. *Dykema v. Godfrey,* 467 So.2d 824 (Fla. 1st DCA 1985). We hold the trial court correctly concluded that plaintiffs had no cause of action against Dowdell.

Plaintiffs alleged Dowdell was employed to represent them in the purchase of the condominium. No allegations were made that Dowdell was instructed to do anything other than represent plaintiffs in the purchase of the property. Generally, the duties of an attorney employed to represent the buyer in a real estate transaction are "to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the title...." and give an opinion on the marketability of the title to the property, *St. Pius X House of Retreats v. Diocese of Camden,* 88 N.J. 571, 443 A.2d 1052, 1061 (1982), and to handle the real estate closing. Plaintiffs did not allege that Dowdell was negligent in performing these duties. Furthermore, plaintiffs did not allege Dowdell was employed to investigate or even inquire into the condominium association action or the structural soundness of the building. Nor did plaintiffs assert Dowdell knew of facts material to the purchase of the condominium but failed to disclose those facts to them.

Finally, the plaintiffs did not claim Dowdell completely disregarded matters coming to his attention which should reasonably have put him on notice that plaintiffs would have legal problems that were not precisely or totally within the scope of the task Dowdell was employed to perform. *See Daugherty v. Runner,* 581 S.W.2d 12 (Ky.App.1978). Accordingly, we find that plaintiffs have failed to allege a cause of action against Dowdell for legal malpractice, thus the trial court's order of dismissal is

Affirmed.

SCHWARTZ, Chief Judge (dissenting in part).
In my view, a jury could properly find that an attorney hired by out of state clients to represent them in the purchase of a condominium unit has the duty to exercise reasonable care

to determine, in the light of information of which he is on actual notice, that the building was the subject of a well-justified claim of defective construction and that the value of the unit was therefore markedly less than the purchase price. In this case, in which this fact could have been discovered merely by examining the complaint and its attached exhibits in an action of which he was specifically aware, or by asking a representative of the condominium association, I believe also that there is a valid question as to whether that duty was breached. Contrary to the majority, I think the observation of the court in *Daugherty v. Runner,* 581 S.W.2d 12 (Ky.App.1978), is directly apropos:

> An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.

581 S.W.2d at 17. For this reason, I would reverse the dismissal of the complaint as to the attorney Dowdell.

I concur in the court's opinion as to the claim against the condominium association.

All Citations

528 So.2d 512, 13 Fla. L. Weekly 1695

Footnotes

1 Section 718.111(1) (a) in relevant part states:

> "The officers and directors of the association have a fidiciary relationship to the unit owners."

613 So.2d 544
District Court of Appeal of Florida,
Third District.

Ramon RIOS and Riversant Corp., N.V., Appellants,
v.
McDERMOTT, WILL & EMERY
and Charles Intriago, Appellees.

No. 91–2737.
|
Feb. 2, 1993.
|
Rehearing Denied March 16, 1993.

Synopsis

Property owner sued law firm he retained to clear title to property. The Circuit Court, Dade County, Carol R. Gersten, J., dismissed fifth amended complaint with prejudice. Property owner appealed. The District Court of Appeal, Levy, J., held that complaint failed to allege sufficient ultimate facts to state cause of action for legal malpractice.

Affirmed.

Nesbitt, J., filed dissenting opinion.

West Headnotes (3)

[1] Attorney and Client
Pleading and evidence

Pleading
Statement of cause of action in general

Although formalistic rules of common law pleading have been replaced by more liberal notice pleading, it remains necessary in setting of legal malpractice case to plead more than the naked legal conclusion that the defendant was negligent.

5 Cases that cite this headnote

[2] Attorney and Client
Pleading and evidence

Allegation that, as result of law firm's negligence, property owner who had retained firm to clear title suffered damage in nature of lost profits on final sale of property, as well as interest payments made by him to lenders from date of first offer until date property was finally sold was insufficient to state legal malpractice claim; allegation that law firm "failed to timely act" was insufficient, and complaint did not allege any of the ultimate facts necessary to permit law firm to frame an answer.

6 Cases that cite this headnote

[3] Attorney and Client
Pleading and evidence

Allegation of violation of Code of Professional Responsibility does not state cause of action for legal malpractice.

3 Cases that cite this headnote

Attorneys and Law Firms

***544** Jerry B. Schreiber, Miami, for appellants.

Steel Hector & Davis and Brian J. Stack, Miami, for appellees.

Before NESBITT, JORGENSON and LEVY, JJ.

Opinion

LEVY, Judge.

Appellants, who were the plaintiffs below, were property owners who now appeal the dismissal, with prejudice, of their fifth amended complaint in a negligence action against the appellees, a law firm.

Appellants Ramos Rios and Riversant Corp., N.V., retained the law firm of McDermott, Will & Emery and Charles Intriago to clear title to some property, ***545** owned by Rios, called the Powergate Plaza. Rios was attempting to sell the Powergate Plaza when an unidentified third party recorded a lis pendens on the property. When Rios obtained a buyer for the property, the sale fell through because title had not been cleared.

Thereafter, title was cleared by appellees, and Rios accepted a second offer to buy for $500,000.00 less than the prior offer. Rios filed a complaint against appellees, claiming that, as a result of the law firm's negligence, he was damaged for the lost profits on the final sale of the property, as well as interest payments made by Rios to his lenders from the date of the first offer until the date the property was finally sold. After several dismissal's of Rios' various amended complaints, the trial court dismissed the fifth amended complaint with prejudice because Rios failed to allege any of the "ultimate facts" necessary to permit appellees to frame an answer. Rios appeals the final order dismissing the action with prejudice.

[1] **[2]** We hold that the trial court properly dismissed the fifth amended complaint because it failed to state a cause of action.

First, the complaint failed to allege sufficient ultimate facts to state a cause of action for legal malpractice. Although "formalistic rules of common law pleading have been replaced by the more liberal 'notice pleading,' it remains necessary in the setting of a legal malpractice case to plead more than the naked legal conclusion that the defendant was negligent." *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.,* 527 So.2d 211, 212 (Fla. 3d DCA 1987), *disapproved of on other grounds,* 537 So.2d 561 (Fla.1988). *See also Brown v. Gardens by the Sea South Condominium Ass'n,* 424 So.2d 181, 183 (Fla. 4th DCA 1983) ("Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient."). The complaint does not state what appellees may have done wrong in its efforts to remove the lis pendens, and does not illuminate any of the specifics of the alleged malpractice. The allegation that appellees "failed to timely act" is an insufficient legal conclusion, and not an ultimate fact.

[3] The allegation that appellees did not render status reports is insufficient to support the legal malpractice claim because the alleged damages do not flow from the failure to give status reports. This Court has previously ruled that an alleged violation of the Code of Professional Responsibility does not state a cause of action for legal malpractice.

The trial court was also correct in rejecting Rios' attempts to use discovery as a substitute for requiring allegations of ultimate facts. *Romans v. Warm Mineral Springs, Inc.,* 155 So.2d 183 (Fla. 2d DCA 1963).

Affirmed.

JORGENSON, J., concurs.

NESBITT, Judge (dissenting):
I respectfully dissent. In any legal malpractice suit, the plaintiff is required to plead and prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973) (citing *Maryland Casualty Co. v. Price,* 231 F. 397 (4th Cir.1916)); *see also Riccio v. Stein,* 559 So.2d 1207 (Fla. 3d DCA), *review dismissed,* 567 So.2d 436 (Fla.1990); *Maillard v. Dowdell,* 528 So.2d 512 (Fla. 3d DCA), *review denied,* 539 So.2d 475 (Fla.1988). The allegations of the plaintiffs' complaint established their attorneys' employment, the attorneys' neglect of duty, and the loss proximately caused by the attorneys' negligence. Specifically, Rios had employed Intriago to close the transaction when a third party recorded a lis pendens. Obviously, either negotiation or legal action was required to clear that kind of problem. The amount of time required ***546** was obviously unpredictable. Consequently, the last amended complaint, which alleged that Intriago "failed to act timely," was the best and most a pleader could have meaningfully pled with respect to that aspect of the alleged negligence. Therefore, I think the allegations were sufficient to state a claim of legal malpractice under the circumstances. I would reverse the dismissal, with prejudice, of the plaintiffs' fifth amended complaint and require the defendant to answer.

All Citations

613 So.2d 544, 18 Fla. L. Weekly D438

End of Document

882 So.2d 436
District Court of Appeal of Florida,
First District.

Gary LANE, Appellant,
v.
Kathleen Holbrook COLD, Esquire, et al., Appellee.

No. 1D03–4540.
|
Aug. 30, 2004.
|
Rehearing Denied Sept. 24, 2004.

Synopsis

Background: Client brought legal malpractice claim against attorney, arising out of attorney's failure to prepare a buy-sell agreement in connection with incorporating a corporation for clients. The Circuit Court, Duval County, Frederick B. Tygart, J., awarded summary judgment to attorney. Client appealed.

[Holding:] The District Court of Appeal, Van Nortwick, J., held that attorney did not undertake to prepare a buy-sell agreement.

Affirmed.

West Headnotes (5)

[1] Attorney and Client
Acts and omissions of attorney in general

Attorney did not undertake to prepare a buy-sell agreement for clients in connection with incorporating a corporation for clients, and thus attorney's failure to prepare agreement could not serve as basis for a legal malpractice claim against her, even though attorney had prepared a buy-sell agreement for clients in connection with a different incorporation, and attorney asked clients if they wanted one for this corporation; clients never requested attorney to prepare a buy-sell agreement or told her of their interest in having one prepared, and attorney's inquiry did not create a duty to prepare an agreement.

[2] Attorney and Client
Elements of malpractice or negligence action in general

To recover in a legal malpractice action, the plaintiff must show: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) such negligence was the proximate cause of loss to the plaintiff.

3 Cases that cite this headnote

[3] Attorney and Client
Elements of malpractice or negligence action in general

With respect to establishing an attorney's employment, as an element of a legal malpractice claim, it is not sufficient merely to show that an attorney-client relationship existed between the parties, it is essential that the plaintiff show that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based.

4 Cases that cite this headnote

[4] Attorney and Client
Acts and omissions of attorney in general

An attorney's negligent act or omission in connection with a client's business planning may be the basis for a malpractice action.

[5] Judgment
Presumptions and burden of proof

Where a movant for summary judgment offers sufficient evidence to support her claim of the nonexistence of a genuine issue of material fact, the opposing party must demonstrate the existence of an issue or issues either by countervailing facts or justifiable inferences from the facts presented.

1 Cases that cite this headnote

Attorneys and Law Firms

***437** Michael J. Davie, Jacksonville, for Appellant.

Francis J. Milon of Harris Brown, P.A., Jacksonville, for Appellee.

Opinion

VAN NORTWICK, J.

Gary Lane appeals a final summary judgment entered in favor of Kathleen Holbrook Cold, appellee, in Lane's legal malpractice action against Cold based upon her alleged failure to prepare a buy-sell agreement. Because no genuine issue of material fact exists as to whether Cold was retained to prepare such an agreement, we affirm.

[1] Cold prepared the necessary documents for the incorporation of Bobcat of North Florida, Inc., with Lane and his now deceased brother, Bobby Lane, as sole shareholders. Lane argues that genuine issues of material fact are in dispute as to whether Cold was negligent in failing to prepare a buy-sell agreement when she incorporated Bobcat to assure a plan of succession for the corporation in the event of the death of one of the brothers. The facts are undisputed that Cold had prepared ***438** a buy-sell agreement at the time of the incorporation of another corporation wholly-owned by the Lanes; that, at the time of the incorporation of Bobcat, Cold inquired of the Lanes as to whether they wished her to prepare a buy-sell agreement; and that no one requested Cold to prepare a buy-sell agreement relating to Bobcat. Although Gary Lane and the Lanes' accountant stated that the Lanes wanted a buy-sell agreement, Lane produced no evidence that either the Lanes, their accountant or anyone acting on their behalf had requested Cold to prepare the agreement or expressed to Cold an interest in having a buy-sell agreement in connection with Bobcat.

[2] **[3]** To recover in a legal malpractice action, the plaintiff must show (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) such negligence was the proximate cause of loss to the plaintiff. *Maillard v. Dowdell,* 528 So.2d 512, 514 (Fla. 3d DCA 1988). With respect to establishing the first element, it is not sufficient merely to show that an attorney-client relationship existed between the parties, it is essential that the plaintiff show that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based. *Id.* Here, Lane has presented no evidence that Cold was retained to prepare a buy-sell agreement or that she otherwise agreed, expressly or implicitly, to undertake that responsibility.

[4] Further, although an attorney's negligent act or omission in connection with a client's business planning may be the basis for a malpractice action, *see, e.g., Conley v. Shutts & Bowen,* 616 So.2d 523 (Fla. 3d DCA 1993); *Viner v. Sweet,* 30 Cal.4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046 (2003); Lane does not allege that Cold gave him negligent advice. It is undisputed that Cold counseled with her clients with respect to the buy-sell agreement and asked her clients whether they wished one to be prepared. Cold's professional inquiry concerning the desire for a buy-sell agreement, without more, did not create a duty on her part to prepare the agreement. *See Boyd v. Brett–Major,* 449 So.2d 952, 954 (Fla. 3d DCA 1984)("It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law.") (quoting *Orr v. Knowles,* 215 Neb. 49, 337 N.W.2d 699, 702 (1983)).

[5] Where a movant for summary judgment (here, Cold) offers sufficient evidence to support her claim of the nonexistence of a genuine issue of material fact, the opposing party (in this case, Lane) must demonstrate the existence of an issue or issues either by countervailing facts or justifiable inferences from the facts presented. *Fleming v. Peoples First Financial Savings and Loan Association,* 667 So.2d 273, 274 (Fla. 1st DCA 1995). Here, Lane failed to present to the trial court any evidence showing that Cold was employed to prepare or otherwise had a professional obligation to prepare a buy-sell agreement for the Lanes and Bobcat. Accordingly, we find that there is no genuine issue of material fact as to one of the essential elements of Lane's cause of action and we affirm the final summary judgment.

AFFIRMED.

BARFIELD and PADOVANO, JJ., concur.

All Citations

882 So.2d 436, 29 Fla. L. Weekly D1985

449 So.2d 952
District Court of Appeal of Florida,
Third District.

Ruth S. BOYD and John W. Boyd, Appellant,
v.
Lin BRETT–MAJOR and Lawyers Professional Liability Insurance Company, Appellees.

No. 83–835.
|
May 8, 1984.

Synopsis

The Circuit Court, Dade County, Phillip W. Knight, J., entered judgment in favor of an attorney and her insurer in legal malpractice action, and clients appealed. The District Court of Appeal, Ferguson, J., held that attorney, who acted in accordance with the instructions given to her by her clients, could not be found liable for legal malpractice for failure to plead an affirmative defense which would have been an absolute defense to mortgage foreclosure action.

Affirmed.

West Headnotes (1)

[1] **Attorney and Client**
Instructions of client

Attorney, who acted in accordance with the instructions given to her by her clients, could not be found liable for legal malpractice for failure to plead an affirmative defense which would have been an absolute defense to mortgage foreclosure action.

4 Cases that cite this headnote

Attorneys and Law Firms

***953** Michael A. Nuzzo, Miami, for appellant.

Conrad, Scherer & James and Joseph S. Kashi, Fort Lauderdale, for appellees.

Before HUBBART, FERGUSON and JORGENSON, JJ.

Opinion

FERGUSON, Judge.

Appeal is taken by the plaintiffs below from a judgment entered on a jury verdict for an attorney and her insurer in a legal malpractice action. The appeal challenges an affirmative defense, and jury instruction given in accordance with that defense. There is no challenge to the sufficiency of the evidence to support the instruction.

The salient facts are as follows. In May 1980, plaintiffs' son was required to post a criminal appearance bond in Palm Beach County. A bonding company agreed to post the $100,000 bond and in return plaintiffs signed a mortgage and promissory note encumbering their home. The bonding company failed to file an affidavit as required by Section 903.14, Florida Statutes (1983), thereby creating an absolute defense to any subsequent foreclosure action. When plaintiffs' son failed to appear in court, the bond was estreated. The bonding company unsuccessfully sought reimbursement from plaintiffs, and ultimately filed a mortgage foreclosure action.

Plaintiffs retained the defendant-attorney to represent them in the action. Plaintiffs claim on appeal that they wished to win the suit, and that the attorney assured them of success. Defendant-attorney contends, however, that because plaintiffs wished to maintain an ongoing relationship with the bonding company, they requested only that the action be delayed so that they could raise the funds to repay the debt. In any event, the attorney filed an answer in the foreclosure action, but failed to adequately plead Section 903.14 as an affirmative defense. A final summary judgment was entered against plaintiffs on the bonding company's motion. On appeal we affirmed the judgment. *Boyd v. International Fidelity Insurance Co.*, 412 So.2d 944 (Fla. 3d DCA 1982).

Plaintiffs thereafter filed a legal malpractice action against the attorney and her insurer. Defendants alleged as an affirmative defense to the claim:

> The Plaintiffs specifically instructed the Defendant, LIN BRETT–MAJOR, to protect their interests in an agreement which they had negotiated with all the bondsmen, including

> Frank McGoey, the bondsman for International Fidelity Insurance Company, and at all times, the Defendant, LIN BRETT–MAJOR, acted in accordance with the instructions given to her by the Plaintiffs, after having explained various potential defenses to the foreclosure actions brought by the bondsmen.

At the conclusion of the evidence, the jury was instructed:

> The next issue for your consideration is that LIN BRETT–MAJOR was acting according to the specific instructions of her client and an attorney is duty bound to carry out the specific instructions of a client provided that criminal or fraudulent ends are not intended. If you find that LIN BRETT–MAJOR was carrying out the specific instructions of her client, ***954** then your verdict should be for the Defendant, LIN BRETT–MAJOR.

The proof at trial showed that the attorney was hired not to win the case but to delay the action (even though the bonding company's failure to file an affidavit created an absolute defense) because the clients intended to live up to their contractual obligation and wished to remain on good terms with the bondsman. Plaintiffs argue that to permit an affirmative defense such as that presented here, which is without legal precedence, would establish an untenable situation by which attorneys could avoid liability for their professional omissions simply by pleading that they followed a course of action desired by the client. We are not convinced that the door is opened to a parade of horribles unless we disapprove of, as a defense to a malpractice claim, that the course of action taken by counsel was at the direction of an otherwise well-advised client. The relevant inquiry is whether the attorney followed the explicit directions of his client, which presents a question of fact.

There are apparently no Florida cases directly on point, but defendants cite two cases from other jurisdictions which have addressed the question. In *Orr v. Knowles,* 215 Neb. 49, 337 N.W.2d 699, 702 (1983), the court held:

> It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law.

Accord Downton v. Perini, 511 F.Supp. 258 (N.D.Ohio 1981) (a lawyer may not force a client to pursue a given course of action even though the lawyer sincerely believes it is in the client's best interests to do so).

Affirmed.

All Citations

449 So.2d 952

470 So.2d 752
District Court of Appeal of Florida,
Third District.

LAWYERS PROFESSIONAL
LIABILITY INSURANCE COMPANY
and Andrew M. Tobin, Appellants,
v.
Hazel McKENZIE, Appellee.

No. 84–1702.
|
May 28, 1985.
|
Rehearing Denied July 1, 1985.

Synopsis

Mortgagee brought legal malpractice action against attorney who was hired to foreclose on property on which mortgagee held mortgage and note. The Circuit Court, Monroe County, David P. Kirwan, J., entered judgment in favor of mortgagee, and attorney appealed. The District Court of Appeal held that attorney was not liable for legal malpractice, even though judicial sale at which mortgagee was highest bidder was set aside on basis of incorrect legal description of property and even though mortgagor was able to obtain purchaser for property before second judicial sale.

Reversed.

West Headnotes (1)

[1] **Attorney and Client**
Conduct of Litigation

Attorney who was hired by mortgagee to foreclose on property was not liable for legal malpractice, even though judicial sale at which mortgagee was highest bidder was set aside on basis of incorrect legal description of property and even though mortgagor was able to obtain purchaser for property before second judicial sale and thereafter satisfied mortgagee's judgment against him, as mortgagee received all that she was entitled to under terms of instrument and mortgagee did not prove that attorney's preparation of incorrect legal description was proximate cause of her failure to get property back. West's F.S.A. § 45.031.

8 Cases that cite this headnote

Attorneys and Law Firms

***752** Vernis & Bowling and Richard H.W. Maloy, Miami, for appellants.

Leesfield & Blackburn and Joseph A. Glick, Miami, for appellee.

Before SCHWARTZ, C.J., and HENDRY and DANIEL S. PEARSON, JJ.

Opinion

PER CURIAM.

The Lawyers Professional Liability Insurance Co. and Andrew M. Tobin appeal from a final judgment entered upon a jury verdict awarding damages to appellee in this legal malpractice action. We reverse.

Appellee Hazel McKenzie hired appellant Tobin to foreclose on property on which she held the mortgage and note. Appellant did all of the relevant preparatory work and eventually obtained a final summary judgment against the mortgagor. The summary judgment ordered a judicial sale of the property to be held on May 14, 1981. Mrs. McKenzie had a credit for her existing judgment and also borrowed some additional funds so that she would have enough money, it was hoped, to be the highest bidder on the property at the judicial sale. Mrs. McKenzie had been negotiating with a prospective purchaser of the property but she did not have a contract for sale nor, in fact, had the parties settled on a price term.

***753** At the judicial sale, wherein appellee was the highest bidder, appellant realized that the legal description of the property was incorrect. The description had been taken from the final summary judgment which he had prepared for the court. After the sale appellant immediately notified appellee and counsel for the mortgagor of the error. He also filed a motion with the trial court to correct the order of summary judgment and the clerk's certificate of title. On May 26, 1981, twelve days after the judicial sale, the mortgagor moved to set aside the judicial sale on the basis of the incorrect legal description of the property. This motion was granted

and a second judicial sale was set for July 7, 1981. Before the second judicial sale the mortgagor was able to obtain a purchaser for the property and thereafter satisfied in full appellee's judgment against him. Thus, appellee received all monies, costs, and fees due to her under the note. In addition, appellant, who has at all times acknowledged his error, paid the interest charges on the money appellee borrowed before the judicial sale. Mrs. McKenzie later sued appellant Tobin for legal malpractice. The jury returned a verdict in favor of appellee and awarded her $55,000.

In order to prevail in her cause Mrs. McKenzie had to prove: 1). that she hired appellant in fact for the specific purpose of getting back the property and not merely recovering the money owed; 2). that appellant neglected a reasonable duty by preparing an incorrect legal description (conceded); 3). that appellant's negligence was a proximate cause of Mrs. McKenzie's injury; that is, that the mortgagor could not have redeemed the property before the clerk's certificate of title was issued to Mrs. McKenzie. Because two of these issues either were not or could not be proved, the jury had to speculate on possible outcomes in order to reach its verdict.

Issues one and three can be resolved by reference to section 45.031, Florida Statutes (1983). Section 45.031(1) outlines the procedure of a judicial sale and specifically states that the property may be redeemed at any time before the sale. Section 45.031(2) recites the form of the clerk's certificate of sale which is issued following the sale to the person who was the highest and best bidder for cash. Section 45.031(3) provides a ten day period following a judicial sale within which to file objections to the sale. If no objections are filed within the ten day period then the clerk issues a certificate of title to the person who holds the certificate of sale. Then, and only then, does the highest bidder actually obtain ownership of the property. Therefore, no attorney can guarantee that a mortgagee who forecloses on property actually will get the property. The mortgagor can redeem the property at any time until the certificate of title is issued, *Islamorada Bank v. Rodriguez,* 452 So.2d 61 (Fla. 3d DCA 1984); *Cooper Smith Properties, Ltd. v. Flower's Baking Co.,* 432 So.2d 683 (Fla. 5th DCA), *rev. dismissed sub nom Coble v. Cooper Smith Properties, Ltd.,* 438 So.2d 831 (Fla.1983), or someone else could be the highest bidder at the judicial sale.

The second issue that appellee had to prove was that but for the error in the legal description which gave the mortgagor more time to locate a buyer for the property, the mortgagor could not have redeemed the property within the ten day period following the first judicial sale. It is undisputed that he did not redeem the property before the sale and that he made no effort to redeem it after the sale. Here, however, the mortgagor knew immediately that there was a problem with the legal description which would require that the sale be set aside and a new judicial sale scheduled. Therefore, he was under no obligation to redeem within the ten day period allowed by section 45.031(3). The mortgagor was not called to testify at trial about his financial ability to redeem the property during those ten days. The only testimony on whether the mortgagor could have redeemed, but for the error, came from his attorney. We do not find the attorney's beliefs and assumptions about the mortgagor's inability to redeem the property within the ten day period following the judicial ***754** sale to be dispositive of this issue. This testimony was based on hearsay and it was restricted by the on-going attorney-client relationship. Without testimony stating categorically that the mortgagor was unable to redeem the property at that time, the jury was forced to assume that he wasn't able to redeem it, thus assuming that the injury to Mrs. McKenzie was caused by appellant's negligence.

We find that the attorney, though negligent, did in fact do what he was employed to do. He foreclosed on the mortgage and appellee received all that she was entitled to under the terms of the instrument. She did not prove that appellant's negligence was a proximate cause of her failure to get the property back. Therefore, the final judgment is reversed.

Reversed.

All Citations

470 So.2d 752, 10 Fla. L. Weekly 1339

730 So.2d 376
District Court of Appeal of Florida,
Third District.

Dean ATKIN and Janet Atkin, his wife, Appellants,
v.
TITTLE & TITTLE, a Florida professional association, and Charles P. Tittle, individually, and Director of Tittle & Tittle, P.A., Appellees.

No. 97–3410.
|
March 31, 1999.

Synopsis

Clients sued attorney for legal malpractice, alleging that, in representing clients in their purchase of lot upon which they sought to build house, attorney negligently failed to determine that zoning prohibited lot's intended use. After jury returned verdict for clients, the Circuit Court, Monroe County, Steven Shea, J., granted attorney's motion for directed verdict. Clients appealed. The District Court of Appeal, Shevin, J., held that evidence supported jury's verdict.

Reversed and remanded.

West Headnotes (7)

[1] Trial
Nature and Grounds

The power to direct a verdict should be cautiously exercised.

1 Cases that cite this headnote

[2] Trial
Insufficiency to support other verdict; conclusive evidence

A motion for a directed verdict should never be granted unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the latter party be sustained.

[3] Attorney and Client
Elements of malpractice or negligence action in general

To prevail in a legal malpractice action, the plaintiff must prove the attorney's employment with respect to the asserted negligent acts; the attorney's neglect of a reasonable duty; and damages proximately caused by the attorney's negligence.

2 Cases that cite this headnote

[4] Attorney and Client
Acts and omissions of attorney in general

Clients who brought legal malpractice action against attorney who represented them in purchase of lot upon which they sought to build house, alleging that attorney negligently failed to determine that zoning prohibited lot's intended use, presented sufficient evidence that attorney was employed with respect to asserted negligent acts; attorney undertook inquiry into whether lot was buildable by virtue of contingency concerning contiguous lot rule that he inserted in purchase contract, and clients presented expert testimony that if attorney had investigated contiguous lot rule issue, he would inevitably have learned that zoning of lot adversely affected his clients.

1 Cases that cite this headnote

[5] Attorney and Client
Acts and omissions of attorney in general

An attorney may not neglect to perform the services which he agrees to perform or which by implication he agrees to perform when he accepts employment.

2 Cases that cite this headnote

[6] Attorney and Client
Skill and care required

An attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill, and dispatch.

[7] **Attorney and Client**
Acts and omissions of attorney in general

An attorney may not disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule.

2 Cases that cite this headnote

Attorneys and Law Firms

***377** Kopplow & Flynn, Miami; Cooper & Wolfe and Nancy C. Ciampa and Sharon L. Wolfe, Miami, for appellants.

Randolph W. Sadtler, Tavernier, for appellees.

Before COPE, LEVY and SHEVIN, JJ.

Opinion

SHEVIN, Judge.

Dean and Janet Atkin appeal a final judgment setting aside a jury verdict and granting defendants Tittle & Tittle, P.A., and Charles Tittle, Esq. [collectively "Tittle"], a directed verdict in a legal malpractice action. We reverse.

The Atkins retained Charles Tittle to represent them in the 1989 purchase of a vacant lot located in Monroe County; they informed Tittle that they wished to build a home on the lot. Tittle was concerned about the contiguous lot rule, which might invalidate the lot purchase; in order to avoid any problems, he included a contingency as to that rule in the purchase contract that he drafted for the Atkins. The Atkins purchased the property. In 1992, the Atkins were denied a building permit to build a house because the lot was zoned SR; under that designation no house could be built because the property did not meet the required minimum lot size. They filed a legal malpractice action against Tittle for failure to determine that the zoning prohibited the lot's intended use.

The jury returned a verdict in the Atkins' favor. However, the trial court granted Tittle's directed verdict motion relying on *Maillard v. Dowdell*, 528 So.2d 512 (Fla. 3d DCA), *review denied*, 539 So.2d 475 (Fla. 1988), and concluding that Tittle "performed the duties for which he was employed, investigated issues brought to his attention, and was not required to render additional land use and zoning opinions for which he was not retained."

[1] **[2]** We disagree with the trial court's conclusion.

> The power to direct a verdict should be cautiously exercised, and a motion for a directed verdict should never be granted unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the latter party be sustained.

Edwards v. Orkin Exterminating Co., Inc., 718 So.2d 881, 883 (Fla. 3d DCA 1998)(quoting *Burch v. Strange*, 126 So.2d 898, 901 (Fla. 1st DCA 1961)); *Perry v. Red Wing Shoe Co.*, 597 So.2d 821 (Fla. 3d DCA 1992). *See Aurbach v. Gallina*, 721 So.2d 756 (Fla. 4th DCA 1998). Here, the record contains evidence from which the jury could lawfully find that Tittle neglected a reasonable duty and proximately caused the Atkins' damages.

[3] **[4]** **[5]** **[6]** To prevail in a legal malpractice action, the plaintiff must prove the attorney's employment; the attorney's neglect of a reasonable duty; and damages proximately caused by the attorney's negligence. *See Sure Snap Corp. v. Baena*, 705 So.2d 46 (Fla. 3d DCA 1997), *review denied*, 719 So.2d 288 (Fla. 1998); *Maillard*, 528 So.2d at 512; *Weiner v. Moreno*, 271 So.2d 217 (Fla. 3d DCA 1973). As to the first element, plaintiff must prove that the attorney was employed with respect to the asserted negligent acts. *Maillard*, 528 So.2d at 514–15. The trial court erred in finding that the Atkins failed to establish this element of their cause of action. In this case, Tittle undertook an inquiry into whether the lot was buildable by virtue of the contingency concerning the contiguous lot rule that he inserted in the purchase contract. The Atkins presented evidence that Tittle's representation fell below the standard of care: Tittle failed to fulfil his obligation to represent the Atkins competently in their purchase of a vacant lot on which Tittle knew that they intended to build a home. The experts testified that if Tittle had investigated the contiguous lot rule issue, ***378** he would inevitably have learned that the zoning of the lot adversely affected his clients. An attorney may not "neglect[ ] to perform the services which he agrees to

perform or which by implication he agrees to perform when he accepts employment." *Dykema v. Godfrey,* 467 So.2d 824, 825 (Fla. 1st DCA 1985). *See also Maillard,* 528 So.2d at 515. Even in the absence of such a purchase contract contingency provision, Tittle would still have been *obligated* to check out the zoning issue or to advise the Atkins to pursue the issue when he assumed the responsibility to represent the Atkins as to the lot buildability. "An attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill, and dispatch." *Crosby v. Jones,* 705 So.2d 1356, 1358 (Fla. 1998). The verdict is supported by competent evidence; the court erred in granting Tittle's directed verdict motion.

[7] Moreover, *Maillard* does not avail Tittle, who assumed the duty to check out the contiguous lot rule. Although *Maillard* provides the general rule as to an attorney's duties when representing a client in a real estate transaction, that rule is not absolute. An attorney may *not* disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule. *Maillard,* 528 So.2d at 515. Tittle's failure to fulfil his duty competently to the Atkins rendered him negligent.

Accordingly, we reverse the judgment with directions to enter judgment according to the jury's verdict.

Reversed and remanded.

All Citations

730 So.2d 376, 24 Fla. L. Weekly D846

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re SRC Holding Corp., D.Minn., April 6, 2007

797 So.2d 30
District Court of Appeal of Florida,
Third District.

Donald McCARTY, Appellant,
v.
Michael L. BROWNING, an individual, and Browning, Sireci, Guller, Klitenick & Thompson, P.A., a professional association, Appellees.

No. 3D00–2733.
|
Sept. 12, 2001.
|
Rehearing and Rehearing En Banc Denied Oct. 31, 2001.

Synopsis

Home buyer brought legal malpractice action against attorney who handled closing for purchase of home, alleging negligence in handling the closing for attorney's failure to discover and disclose existing code violation on property. The Circuit Court, Monroe County, Richard G. Payne, J., entered summary judgment for attorney. Buyer appealed. The District Court of Appeal, Fletcher, J., held that attorney was not liable for legal malpractice.

Affirmed.

West Headnotes (2)

[1] Attorney and Client
Conduct of litigation

Attorney who handled closing for purchase of home was not liable to home buyer for legal malpractice in form of negligence, based on attorney's alleged failure to discover and disclose existing code violation on property, where attorney did not enter into attorney-client relationship with buyer for purpose of examining building permits or investigating applicable zoning and land use regulations to ensure that property was in code compliance, attorney represented at closing the lender, and assisted buyer's interest at closing only so far as preparing and reviewing loan documents, receiving and disbursing funds provided by lender, and overseeing actual closing transaction, and attorney was not aware of code violation.

3 Cases that cite this headnote

[2] Attorney and Client
Pleading and evidence

Home buyer's allegation that attorney who handled closing for purchase of home "should have known" of existing code violation on property was insufficient to allege a duty on attorney, in buyer's action against attorney for legal malpractice in form of negligence, based on attorney's alleged failure to discover and disclose code violation.

1 Cases that cite this headnote

Attorneys and Law Firms

***30** Michael R. Barnes (Key West), for appellant.

Cole White & Billbrough and G. Bart Billbrough, for appellees.

Before SCHWARTZ, C.J., and COPE and FLETCHER, JJ.

Opinion

FLETCHER, Judge.

Donald McCarty appeals from an adverse summary judgment on his legal malpractice claim against Michael Browning, individually, and the law firm of Browning, Sireci, Guller, Klitenick & Thompson, P.A. [together Browning]. We affirm.

In December, 1992, Browning handled for McCarty the closing for McCarty's purchase of a home. After the purchase (in 1996) McCarty was cited by Monroe County for having an illegal downstairs enclosure [1] on the property, which enclosure pre-existed McCarty's purchase. ***31** McCarty, to bring the property into code compliance, removed the offending enclosure, then filed a legal malpractice claim against Browning, alleging negligence in handling the closing

for Browning's failure to discover and disclose the existing code violation on the property.

[1] First, the record shows that Browning did not enter into an attorney-client relationship with McCarty for the purpose of examining building permits or investigating the applicable zoning and land use regulations to ensure that the property was in code compliance. *See Kates v. Robinson,* 786 So.2d 61 (Fla. 4th DCA 2001)(in stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship, but to also allege that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based). Instead, the record shows that Browning represented at the closing Barnett Bank, the lender, and assisted McCarty's interest at the closing only so far as preparing and reviewing loan documents, receiving and disbursing funds provided by Barnett Bank, and overseeing the actual closing transaction.

[2] Second, McCarty's complaint alleges that Browning "knew or should have known" of the pre-existing code violation and thus had a duty to advise McCarty thereof. While it is correct that an attorney has a duty to advise the client of legal problems not within the scope of the task the attorney was retained to perform, but of which the attorney becomes aware, *see Maillard v. Dowdell,* 528 So.2d 512 (Fla. 3d DCA 1988), here the record reflects that Browning was not aware of the code violation. McCarty's allegation that Browning "should have known" of the violation is insufficient to allege a duty on Browning. If we were to hold to the contrary attorneys would be required not only to perform the services for which they were retained, but would be required for self-protection to unilaterally expand that task to investigate and analyze every issue conceivably related thereto. This unreasonable "duty" we decline to recognize or create.

Affirmed.

All Citations

797 So.2d 30, 26 Fla. L. Weekly D2194

Footnotes

1 Which enclosure had created a ground level living area, thus increasing the home's "useful" square footage.

788 So.2d 393
District Court of Appeal of Florida,
Fifth District.

Francis R. PROTO, Appellant/Cross–Appellee,
v.
Richard S. GRAHAM, et al.,
Appellees/Cross–Appellants.

No. 5D00–1464.
|
June 29, 2001.

Synopsis

Former client sued attorney for malpractice, alleging that attorney's advice to stop making payments to bank on mortgage, and failure to negotiate settlement with bank, resulted in summary judgment against client in bank's foreclosure action, awarding bank attorney fees and costs in addition to amount of mortgage. Following trial, the Circuit Court, Volusia County, Joseph G. Will, J., denied attorney's motion for directed verdict, and entered judgment on jury verdict for client, after remittitur. Attorney appealed. The District Court of Appeal held that client failed to prove either negligence or causation.

Reversed.

West Headnotes (5)

[1] Attorney and Client
Elements of malpractice or negligence action in general

Three basic elements of legal malpractice action are: (1) employment of attorney, (2) attorney's neglect of reasonable duty, and (3) proximate cause.

2 Cases that cite this headnote

[2] Attorney and Client
Acts and omissions of attorney in general

Attorney's good faith tactical decisions are not actionable as malpractice.

2 Cases that cite this headnote

[3] Attorney and Client
Pleading and evidence

There was insufficient evidence to support finding that attorney committed legal malpractice by advising client to stop making mortgage payments to bank based on fraud of property developer and mortgage broker, and failing to negotiate settlement with bank, or that alleged malpractice caused summary judgment to be entered against client in bank's foreclosure action, awarding bank amount of mortgage plus attorney fees and costs; client's expert witness' testimony that attorney was negligent and caused client's damages was based on speculation and conjecture.

2 Cases that cite this headnote

[4] Negligence
In general; degrees of proof

Negligence actions follow the more likely than not standard of causation and require proof that negligence probably caused plaintiff's injury.

1 Cases that cite this headnote

[5] Negligence
Necessity of causation

Negligence
Proximate cause

Causation is essential element of negligence, of which plaintiff has burden of proof.

Attorneys and Law Firms

***393** Ronnie H. Walker of Ronnie H. Walker, P.A., Orlando, for Appellant/Cross–Appellee.

Jennifer S. Carroll and Diane F. Medley, of Law Offices of Jennifer S. Carroll, P.A., West Palm Beach, and James W. Smith, of Smith & Schoder, L.L.P., Daytona Beach, for Appellee/Cross–Appellants.

Opinion

PER CURIAM.

This is an appeal from the denial of a motion for a directed verdict in a legal malpractice action. Richard Graham and his law firm claim that the trial court erred, as a matter of law, by denying their motion for a directed verdict as to negligence. We agree and reverse.

In September of 1989, Dr. Francis Proto, a dentist from Connecticut, invested $80,000 in a double-wide, mobile home in Nature's Woods, a development in DeLand, ***394** Florida. Century Federal loaned Dr. Proto the money to buy the mobile home. Dr. Proto then agreed to lease the unit with the lease payments being applied to the mortgage. Pathfinder Services, Inc., was the agent and sales manager hired to manage the property, receive the rental payments and then make the mortgage payments directly to Century Federal. Although Century Federal had no direct connection to Nature's Woods, it had a written agreement with Americom, a mortgage broker, to generate mobile home credit transactions for Century Federal. Americom also prepared all the closing documents and handled the closing.

At the closing, Dr. Proto was told to make out his down payment check for 20% of the purchase price. That check was photocopied and then torn up and given back to Proto. He was then told to make another check for 5%. Thus, Dr. Proto knowingly participated in a scheme to defraud Century. Dr. Proto was informed at closing that his double-wide had not been finished, but he closed regardless and acknowledged to Century that one had been delivered.

After Pathfinder made several mortgage payments, it became apparent that Pathfinder and Americom had been defrauding both lenders and buyers and the whole project was in jeopardy. As it turned out, at least one of the lenders was in collusion with the Nature's Woods developer, Abb–Hitt. Century Federal was not.

Dr. Proto contacted his Connecticut lawyer who referred him to Graham's law firm which was already representing several Nature's Woods investors. Those investors had decided to stop making mortgage payments. Most indicated a willingness to give up their down payments and any payments made in exchange for being relieved of their obligation. Graham gave them no reassurances but promised to work on it.

On August 15, 1990, Graham wrote letters to the banks involved in some 70 loans, informing them of his representation and asking that the banks forego any action toward acceleration, collection, or foreclosure. He told them that he had discovered serious irregularities, and that the clients would like to settle amicably. The investors, including Dr. Proto, authorized Graham to settle for an exchange of the mobile homes, any payments made, and assignments of any claims against the developers and others in return for releases from personal liability.

By mid-September 1990, Graham wrote to Dr. Proto's Connecticut attorney that he had contacted Century Federal and found that Proto's loan was the only one placed with that bank. Century Federal, which had a longstanding relationship with the loan broker Americom, seemed willing to withhold enforcement of the loan. Graham wrote that "[t]here is some risk involved in discontinuing payments," but that this seemed the best way to put pressure on the bank. Graham's office advised Proto not to make any more payments to Century Federal.

Of the 70 loans, 67 were resolved favorably to the clients. Only two banks, involved in three of the loans, resisted. Century Federal was one of those two banks.

In late November 1990, Century Federal filed a foreclosure action against Dr. Proto. Graham's firm was employed by Dr. Proto to defend and counterclaimed against Century Federal. They also brought fraud claims against Abb–Hitt and Pathfinders and brought Americom into the lawsuit. In joining Americom, Graham believed he could establish that Americom was an agent of Century Federal.

Graham's belief was strengthened when discovery revealed that Americom was either ***395** in the same building or in the building next door to Century Federal. Business cards for Americom listed "Century Bank." A written agreement between Century Federal and Americom, entered into on August 10, 1989, about a month before the Proto closing, stated that Americom would generate credit transactions for Century Federal and would relieve the bank of "outside manpower requirements." The document did not state that Americom was an independent contractor, which later turned out to be the case.

Century and Abb–Hitt moved for a summary judgment. To the surprise of Graham, the motion was granted and a foreclosure judgment in favor of Century was entered for $83,334.83

in principal and interest, together with $28,907.30 in fees and costs. Graham was authorized to appeal, and this court affirmed the summary judgment as to Century, but reversed the judgment in favor of Abb–Hitt. *Proto v. Century Federal Savings Bank,* 629 So.2d 921 (Fla. 5th DCA 1993). A final judgment was thereafter entered in favor of Century which added appellate fees and costs of $15,306.

Dr. Proto then sued Graham and his law firm seeking recovery of the final judgment against him. A jury returned a verdict of $122,446.47. The trial court granted a remittitur as to that portion of the jury verdict which included mortgage principal, interest and penalties, and entered a final judgment of $32,179.28. [1]

Graham argues that the trial court should have directed a verdict in his favor when Dr. Proto failed to put forth reasonable evidence to support a legal malpractice claim. Specifically, Graham claims Dr. Proto failed to prove that any negligence resulted in or was the proximate cause of his loss.

[1] Under Florida law, three basic elements are required to be proven in a legal malpractice action: (1) employment of the attorney; (2) attorney's neglect of a reasonable duty; and (3) proximate cause.

[2] Good faith tactical decisions are not actionable in Florida. *Crosby v. Jones,* 705 So.2d 1356 (Fla.1998). As stated by the court:

> Florida has long held that an attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill and dispatch. *Weekley v. Knight,* 116 Fla. 721, 156 So. 625 (1934); *Riccio v. Stein,* 559 So.2d 1207 (Fla. 3d DCA 1990). This does not mean, however, that an attorney acts as an insurer of the outcome of a case. Good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity.

In *Kaufman v. Stephen Cahen, P.A.,* 507 So.2d 1152 (Fla. 3d DCA 1987), the court stated:

> An attorney who acts in good faith and in honest belief that his advice and acts are well-founded and in the best interest of his client is not answerable for a mere error in judgment or for a mistake in a point of law which has not been settled by the court of last resort in his state and on which reasonable doubt may be entertained by well-informed lawyers. *Hodges v. Carter,* 239 N.C. 517, 80 S.E.2d 144, 146 (1954).

[3] In the present case, Dr. Proto failed to prove two of the three elements: ***396** that Graham neglected any reasonable duty, or that Dr. Proto's damages were caused by Graham. In short, a view of all the evidence, including the testimony of Dr. Proto's expert, reveals that Proto failed to make a prima facie case of legal malpractice. *See Great Southern Peterbilt, Inc. v. Geiger,* 616 So.2d 1127, 1128 (Fla. 1st DCA 1993).

[4] **[5]** In Florida, all negligence actions "follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury." *Gooding v. University Hosp. Building, Inc.,* 445 So.2d 1015, 1018 (Fla.1984). Causation is an essential element of negligence, of which the plaintiff has the burden of proof and plaintiff

> must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.*

Id. (quoting PROSSER, LAW OF TORTS § 41 (4th ed.1971) (emphasis supplied)).

The expert testimony of Proto's only expert, Stephen Bozarth, should have been rejected by the trial court in considering the motion for a directed verdict. His opinion was based on sheer speculation and facts or inferences not supported by the evidence.

Attorney Bozarth testified that although he was not critical of Graham's original advice to Proto not to make payments on the mortgage, the advice should have changed once Graham's office had had an opportunity to investigate the facts. Bozarth opined that a reasonable, prudent lawyer would have concluded that Century Federal's position was meritorious and that Proto had no chance to win against the lending institution. According to Bozarth, it was below the proper standard of care for Graham not to have negotiated a deal with Century Federal in June 1991 even if it meant conceding to all demands made by the lender. Bozarth concluded that the allegedly bad legal advice was the cause of the summary judgment and the judgments for costs and attorney's fees.

A careful review of the record reveals that, as a matter of law, the evidence presented at trial cannot support the jury finding of negligence. There is no competent substantial evidence that Graham neglected any reasonable duty, or that any alleged negligence "probably rather than possibly" caused Dr. Proto's alleged damages. Instead, there is merely speculation and conjecture, unsupported by the evidence, that bad legal advice was the cause of the summary final judgment of foreclosure.

We therefore reverse and remand for entry of a judgment in favor of Graham and his law firm.

REVERSED; REMANDED.

HARRIS, PLEUS and PALMER, JJ., concur.

All Citations

788 So.2d 393, 26 Fla. L. Weekly D1632

Footnotes

1 It is impossible to tell from the record how either the jury verdict or the amount of the final judgment was calculated.

529 So.2d 1183
District Court of Appeal of Florida,
Second District.

David J. STAKE and Deborah S. Stake, his wife, Appellants,
v.
Bruce M. HARLAN, Appellee.

No. 87–2714.
|
July 13, 1988.
|
Rehearing Denied Aug. 25, 1988.

Synopsis

Clients brought legal malpractice action against attorney alleging negligence in advice they received regarding purchase of condominium unit. The Circuit Court, Pinellas County, Crockett Farnell, J., dismissed complaint, and clients appealed. The District Court of Appeal, Lehan, J., held that attorney had duty to inform clients of his awareness of possible change in law through certification of question which could have materially adverse effect upon them.

Reversed and remanded.

Ryder, Acting C.J., and Frank, J., filed specially concurring opinions.

West Headnotes (1)

[1] Attorney and Client
Acts and Omissions of Attorney in General

Attorney had duty to inform his clients of his awareness of possible change in law through certification of question which could have materially adverse effect upon clients.

4 Cases that cite this headnote

Attorneys and Law Firms

***1184** Philip J. Maloney, Jr. of Ruiz, Skelton & Maloney, P.A., Tampa, for appellants.

John N. Jenkins of Marlow, Shofi, Smith, Hennen, Smith & Jenkins, P.A., Tampa, for appellee.

Opinion

LEHAN, Judge.

Plaintiffs appeal from the dismissal with prejudice of their amended complaint for legal malpractice. We reverse.

Negligence on the part of defendant attorney is alleged to have occurred through his advice to, and failure to advise, plaintiffs in connection with his representation of them in their purchase of a condominium unit. That purchase on April 11, 1985, involved their paying $5,000 cash, executing a promissory note for $12,000 secured by a balloon purchase money second mortgage due in 1990, and assuming a first mortgage which contained a "due-on-sale" clause. That clause required the prior written consent of the first mortgagee to plaintiffs' assumption of the mortgage. [1]

The amended complaint alleges that:

(a) Plaintiffs retained defendant as their attorney "for a compensation to be paid him therefore [sic], to review all documents pertaining to the purchase of certain condominium unit ... to protect their interests in the subject transaction: to advise them concerning the execution of certain documents relative to the subject transaction; and to represent them at the closing on the purchase of said unit...."

(b) Defendant advised plaintiffs that they need not comply with the assumption procedure required by the due-on-sale clause in the first mortgage and could effectuate a "quiet assumption" of that mortgage by tendering to the mortgagee the next monthly payment and informing the mortgagee that upon its acceptance of that payment, they would assume that the mortgagee had acquiesced to the purchase of the unit by plaintiffs. In addition, defendant advised plaintiffs to execute a release and hold harmless agreement, holding the sellers and the title company harmless from any responsibility should the mortgagee declare the mortgage due and payable in full. Plaintiffs closed the purchase under those circumstances and executed such a hold harmless agreement.

(c) At the time of defendant's foregoing advice to plaintiffs and of the closing of the purchase of the condominium unit, Florida law was reflected in *Weiman v. McHaffie,* 448 So.2d 1127 (Fla. 1st DCA 1984), hereinafter called "*Weiman I.*" In that case the First District Court of Appeal, consistent with other district court of appeal decisions, held that due-on-sale clauses in mortgages are not enforceable in Florida without a showing that the mortgagor's transfer of the mortgaged property would impair the mortgagee's security.

(d) *Weiman I* certified to the Florida Supreme Court as of great public importance the question of the enforceability of such a clause. [2]

(e) Defendant had actual knowledge of the *Weiman I* certification as evidenced by his citation of that case in his letter to the first ***1185** mortgage holder tendering plaintiffs' monthly mortgage payment.

(f) On May 2, 1985, in *Weiman v. McHaffie,* 470 So.2d 682 (Fla.1985), hereinafter "*Weiman II,*" the Florida Supreme Court, answering that certified question in the affirmative, changed the law of Florida by deciding that such clauses are enforceable pursuant to their terms.

(g) Following the decision in *Weiman II* the holder of the first mortgage declared the entire sum due and payable. After plaintiffs' failure to pay, the mortgagee filed a foreclosure suit. Judgment of foreclosure was entered, resulting in loss to plaintiffs. As a result of plaintiffs' agreement to release and hold harmless the sellers, plaintiffs had no recourse against the sellers for their loss upon the foreclosure.

(h) Defendant breached his duty to make plaintiffs aware of the implications of the *Weiman I* certification "so that the Plaintiffs could make an informed decision whether or not to ... transact the subject real estate closing in the manner suggested by the Defendant."

The basis for the trial court's dismissal with prejudice appears to have been that "the gravamen of the amended complaint against the Defendant ... continues to be an allegation that he was under a duty to anticipate changes in the law of this State by this State's highest Court...." and that no such duty existed. The effect of the dismissal was to rule that there was no duty of defendant attorney to advise his clients of a possible change in the law even though he knew of that possibility from his knowledge of the certification by the district court of appeal. This was in effect an erroneous ruling under the alleged circumstances of this case that as a matter of law an attorney has no duty to give his clients the benefit of knowledge which he has and on the basis of which it may be foreseeable to him that the clients, if they had that knowledge, would avoid acting to their material detriment.

Circumstances under which an attorney does and does not have a duty to his client are generally described in *Feil v. Wishek,* 193 N.W.2d 218, 224 (N.D.1972), quoting *McCullough v. Sullivan,* 102 N.J.L. 381, 384, 132 A. 102, 103 (1926), as follows:

> A lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake in the practice of his profession of the law that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession. He contracts to use the resonable [sic] knowledge and skill in the transaction of business which lawyers of ordinary ability, and skill possess and exercise. On the one hand, he is not to be held accountable for the consequences of every act which may be held to be an error by a court. On the other hand, he is not immune from responsibility, if he fails to employ in the work he undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill.

See also 4 Fla.Jur.2d *Attorneys at Law* § 168 (1978).

Defendant argues that *Kaufman v. Stephen Cahen P.A.,* 507 So.2d 1152 (Fla. 3d DCA 1987), supports the trial court's dismissal because *Kaufman* held that a lawyer has no duty to predict accurately a change in the law. That holding reflected the principle that "[a] lawyer does not guarantee the efficacy of his advice." *Dillard Smith Construction Co. v. Greene,*

337 So.2d 841, 843 (Fla. 1st DCA 1976). *See also Daytona Development Corp. v. McFarland,* 505 So.2d 464, 467 (Fla. 2d DCA 1987). But our holding does not depart from that principle. The basic issue on this appeal is not whether defendant had no duty to accurately predict a change in the law but is whether he had as a matter of law no duty to inform his clients of his awareness of a possible change in the law which could have a materially adverse effect upon them. By its certification ***1186** to the Florida Supreme Court quoted above, the First District Court of Appeal called attention to that possibility and also called attention to its significance by saying that "the question ... has far-reaching implications for ... the people of this state...." *Weiman I,* 448 So.2d at 1129.

Defendant nonetheless argues that the types of facts in *Kaufman* and those in the instant case are nearly identical in the sense that *Kaufman* also involved a supreme court decision which changed the law and which was pending at the time the defendant in that case rendered legal services. However, *Kaufman* involved a significantly different type of situation. *Kaufman* involved the law regarding the statute of limitations for a wrongful death action based upon medical malpractice having been changed by the Florida Supreme Court, so as to shorten the applicable limitations period and bar plaintiff's right to sue, apparently without there having been advance knowledge on the part of plaintiff's attorney, whether through a certified question or other means, that such a change might occur. Here, it is alleged that the defendant was aware of the pending question which had been certified in *Weiman I.*

This is not to indicate, or address whether, a lawyer may ever have a duty to be aware of questions certified by district courts of appeal to the Florida Supreme Court. That is not before us. Nor are other issues in a case like this, such as, proximate cause and damages, before us. *See Ard v. Aulls,* 477 So.2d 1032 (Fla. 5th DCA 1985).

Reversed and remanded for proceedings consistent herewith.

RYDER, A.C.J., concurs specially with opinion.

FRANK, J., concurs specially with opinion.

RYDER, Acting Chief Judge, concurring specially.
I concur in the result reached herein, but for different reasons. This case comes to us on appeal from a bare bones order granting a motion to dismiss for failure to state a cause of action.

I find it unnecessary to go further in this matter than a review of the question whether the complaint stated a cause of action and, if so, whether the trial court erred in his dismissal order.

"A legal malpractice cause of action has three elements: (1) the attorney's employment and (2) his neglect of a reasonable duty, which (3) is the proximate cause of loss to his client." *Hatcher v. Roberts,* 478 So.2d 1083, 1087 (Fla. 1st DCA 1985). My review of the second amended complaint reveals allegations fulfilling all elements. Thus, I would reverse and set aside the order of the trial court and allow the cause to proceed accordingly. To go further at this juncture seems ill-advised and untimely wherein we address ultimate issues which should be allowed to develop in subsequent proceeding below.

FRANK, Judge, concurring specially.

It is my opinion, simply stated, that although a lawyer cannot be held to a standard requiring certainty in anticipating the future state of the law, or an awareness of every question certified to a higher tribunal, when, as is the case here, the lawyer has actual knowledge that a question of law bearing upon a client's interests has been certified, a duty arises to advise the client that such certification may result in a change of the law.

All Citations

529 So.2d 1183, 13 Fla. L. Weekly 1675

Footnotes

1 A due-on-sale clause is "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 145, 102 S.Ct. 3014, 3018, 73 L.Ed.2d 664, 669 (1982).

2 The language of the First District in that regard was:

However, because the question involved in this appeal has far-reaching implications for certain financial institutions and the people of this state we certify the following question to the Florida Supreme Court:

IS A DUE–ON–SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

End of Document

467 So.2d 315
District Court of Appeal of Florida,
Third District.

Olive LORRAINE, a beneficiary under the Last Will and Testament of Cecil Johnson, Appellant,
v.
GROVER, CIMENT, WEINSTEIN & STAUBER, P.A., Marvin Weinstein, individually, and INA Underwriters Insurance Company of Los Angeles, California (INAPRO), a foreign corporation, Appellees.

No. 84–975.
|
Feb. 5, 1985.
|
Rehearing Denied March 13, 1985.

Synopsis

Beneficiary under testator's will brought action against testator's attorney, his law firm, and their insurer after devise of testator's residence failed because it was testator's homestead. The Circuit Court, Dade County, Joseph J. Gersten, J., granted defendants' motion for summary judgment, and plaintiff appealed. The District Court of Appeal, Nesbitt, J., held that: (1) beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about possibility of making inter vivos transfer of his residence failed, and (2) beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about making devise to beneficiary of property other than his residence.

Affirmed.

Daniel S. Pearson, J., filed dissenting opinion.

West Headnotes (9)

[1] Attorney and Client

Elements of malpractice or negligence action in general

Generally, in a negligence action against attorney, plaintiff must prove: attorney's employment by plaintiff (privity); attorney's neglect of a reasonable duty owed to plaintiff; and that such negligence resulted in and was proximate cause of loss to the plaintiff.

6 Cases that cite this headnote

[2] Attorney and Client

Duties and liabilities to adverse parties and to third persons

Attorney preparing a will has a duty not only to testator client, but also to testator's intended beneficiaries; therefore, in limited circumstances, intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails.

2 Cases that cite this headnote

[3] Attorney and Client

Duties and liabilities to adverse parties and to third persons

Beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about possibility of making inter vivos transfer of his residence, although devise to beneficiary of residence failed because it was a homestead, since no privity existed between beneficiary and attorney with respect to inter vivos transfer of property. West's F.S.A. Const. Art. 10, § 4; West's F.S.A. § 732.401.

[4] Attorney and Client

Duties and liabilities to adverse parties and to third persons

Generally, attorney is not liable to third parties for negligence or misadvice given to client concerning inter vivos transfer of property.

1 Cases that cite this headnote

[5] Attorney and Client
Duties and liabilities to adverse parties and to third persons

For beneficiary's action against attorney for negligent drafting of will to fall within exception to privity requirement, testamentary intent that has allegedly been frustrated must be expressed in the will and beneficiary's loss must be a direct result of, or proximately caused by attorney's alleged negligence.

9 Cases that cite this headnote

[6] Wills
Writings and declarations of testator

Declarations made by testator concerning disposition of his property are not admissible to show that he intended to dispose of his property in a particular manner not evidenced by the will.

[7] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney becomes liable to a testamentary beneficiary only if testamentary intent, as expressed in the will, is frustrated by attorney's negligence and beneficiary's legacy is lost or diminished as a direct result of that negligence.

1 Cases that cite this headnote

[8] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about making devise to beneficiary of property other than his residence, although devise of testator's residence failed because it was a homestead, since constitutional provision rather than negligence in drafting will frustrated testamentary intent. West's F.S.A. § 732.4015; West's F.S.A. Const. Art. 10, §§ 4, 4(c).

3 Cases that cite this headnote

[9] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney will be liable to intended beneficiary under a will only if attorney's negligence in drafting the will or having it properly executed directly results in plaintiff beneficiary's loss.

Attorneys and Law Firms

***316** Fogle & Poole and Lewis H. Fogle, Jr., William Feldman, Miami, for appellant.

Marlow, Shofi, Ortmayer, Smith, Connell & Valerius and Joseph H. Lowe, Miami, for appellees.

Before HUBBART, NESBITT and DANIEL S. PEARSON, JJ.

Opinion

NESBITT, Judge.

The plaintiff appeals a summary final judgment entered in favor of the defendants on a claim of legal malpractice in drafting a will. We affirm.

The facts relevant to this appeal are undisputed. In March 1981, Johnson, while in the hospital, contacted Weinstein, an attorney, to have a will drawn up. A phone conversation ensued between Johnson, Weinstein and Weinstein's secretary, in which the secretary took notes on Johnson's testamentary wishes. In conformity with these expressed wishes, a will was drawn up and executed. Johnson died of cancer two weeks after the will was executed.

Prior to his death, Johnson shared his residence with his mother (the plaintiff) and his minor son. The will contained a provision which left his mother a life estate in the residence with the remainder going to his sons. In the probate proceedings, however, it was determined that the residence was Johnson's homestead and consequently was not subject to devise.[1] *See* Art. X, § 4, Fla. Const.; § 732.401–.4015, Fla.Stat. (1981). It therefore passed directly

to Johnson's children pursuant to section 732.401, Florida Statutes (1981). [2]

The plaintiff, Johnson's mother, instituted this suit against Weinstein, his law firm, and their insurer. The complaint alleges that due to Weinstein's negligence and lack of skill in drafting the will, the devise of the life estate in the residence to the plaintiff failed. Upon motion, the trial court ***317** entered a summary final judgment in favor of the defendants. This appeal followed.

[1] **[2]** Generally, in a negligence action against an attorney, the plaintiff must prove: (1) the attorney's employment by the plaintiff (privity); [3] (2) the attorney's neglect of a reasonable duty owed to the plaintiff; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Drawdy v. Sapp,* 365 So.2d 461 (Fla. 1st DCA 1978); *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). Florida courts have recognized, however, that an attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries. In limited circumstances, therefore, an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails. *DeMaris v. Asti,* 426 So.2d 1153 (Fla. 3d DCA 1983); *McAbee v. Edwards,* 340 So.2d 1167 (Fla. 4th DCA 1976). Although it is generally stated that the action can be grounded in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is "conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." *McAbee,* 340 So.2d at 1169 (quoting *Heyer v. Flaig,* 70 Cal.2d 223, 449 P.2d 161, 74 Cal.Rptr. 225 (1969)). In effect, *McAbee* and *DeMaris* have established a limited exception in the area of will drafting to the requirement of the first element (the privity requirement) in a legal malpractice action.

On this appeal, the plaintiff argues that Weinstein was negligent in not advising Johnson of the prohibition against devising homestead property and of possible alternatives. As the plaintiff suggests, it may have been possible to structure a conveyance to avoid the constitutional provision by having Johnson make an *inter vivos* transfer of a vested interest in the residence to her. It is also possible that Johnson might have wanted to devise some other comparable property interest to his mother if he had known of the constitutional prohibition or that the devise might fail. Perhaps it could even be said that Weinstein's failure to advise Johnson of these possibilities was a breach of duty owed to Johnson. [4] These possibilities, however, do not aid the plaintiff's cause here.

[3] **[4]** With regard to the first possibility, there is no indication in the record of any desire on the part of Johnson to make a transfer of any interest in the residence prior to his death. Even if such a desire did exist, however, any alleged negligence attributable to Weinstein's failure to advise Johnson concerning the possibility of an *inter vivos* transfer falls outside the limited exception established in *McAbee* to the privity requirement in legal malpractice actions. Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an *inter vivos* transfer of property. *See Southworth v. Crevier,* 438 So.2d 1011 (Fla. 4th DCA 1983); *Drawdy.* Since no privity existed between the plaintiff and Weinstein and no duty was owed to the plaintiff, this action cannot be maintained by the plaintiff on an alleged breach of duty owed solely to Johnson.

[5] Under the limited exception to the privity requirement, this court has held that an attorney's

> liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary ***318** intent, *as expressed in the will,* is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence.

DeMaris, 426 So.2d at 1154. The holding in *DeMaris* encompasses two concepts. First, for an action to fall within the exception, the testamentary intent that has allegedly been frustrated must be "expressed in the will." Second, the beneficiary's loss must be a "direct result of," or proximately caused by the attorney's alleged negligence.

[6] **[7]** **[8]** In the present case, there is no indication that Johnson wished or intended any alternative property interest to pass to his mother under the will if the devise of the life estate in the residence failed. An intent to devise a comparable interest in other property upon the failure of the primary devise cannot reasonably be extrapolated from any of the provisions in Johnson's will. Furthermore, a disappointed beneficiary may not prove, by evidence extrinsic to the will, that the testator's testamentary intent was other than

that expressed in the will.[5] *DeMaris.* In the instant case, Johnson's only testamentary intent expressed in the will that has been frustrated is his wish that his mother, the plaintiff, receive a life estate in his residence upon his death.[6]

[9] An attorney will be liable to an intended beneficiary under a will only if the attorney's negligence in drafting the will or having it properly executed directly results in the plaintiff-beneficiary's loss. *DeMaris,* 426 So.2d at 1154. In the case at bar, the plaintiff alleges in her complaint, as ***319** she must to fit within the exception to the privity requirement, that the devise of the life estate failed and, thus, Johnson's testamentary intent was frustrated, due to Weinstein's negligence in drafting the will. The probate court, however, determined that the residence was Johnson's homestead within the meaning of article X, section 4 of the Florida Constitution. Since Johnson was survived by a minor child, the homestead was not subject to devise. Art. X, § 4(c), Fla. Const.; § 732.4015, Fla.Stat. (1981). Accordingly, there was no means by which a will could have been drafted so that Johnson's testamentary intent, that a life estate in the homestead pass to his mother on his death, could have been accomplished. *Cf. Johns v. Bowden,* 68 Fla. 32, 66 So. 155 (1914) and *Estate of Johnson,* 397 So.2d 970 (Fla. 4th DCA 1981) (declaring invalid attempts (by means of trusts) to contravene the constitutional prohibition against testamentary disposition of homestead property). Johnson's testamentary intent was not frustrated by Weinstein's professional negligence, but rather by Florida's constitution and statutes.[7] Summary judgment for the defendants was therefore proper since any alleged negligence on the part of Weinstein in drafting the will could not have been the cause of the plaintiff's claimed loss.

Upon the foregoing analysis, the summary final judgment is affirmed.

DANIEL S. PEARSON, Judge, dissenting.

As I understand it, the majority opinion is bottomed on the legal premise that an attorney can be liable to an intended beneficiary under a will *only* if the beneficiary's loss resulted from the attorney's negligence in either drafting the will or seeing to its proper execution. Since here the will was indisputably composed in complete accordance with the testator's expressed wishes, and, of course, properly executed, it obviously follows, says the majority, that the appellant has no cause of action against the obedient scrivener. In other words, the majority declares the attorney to be immune from liability so long as, robot-like, he puts down on paper what the testator tells him to put down. And, according to the majority, if some law which was known or should have been known to the attorney prevents the testator's correctly recorded wishes from being carried out, it is the law, not the attorney, which has frustrated the testamentary intent.

I think it utterly indefensible to say that an attorney's failure to advise a testator that his desired devise is a nullity is any less negligent than an attorney's faulty draftsmanship or improper execution of a will. Whether a defendant can "be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." ***320** *McAbee v. Edwards,* 340 So.2d 1167, 1169 (Fla. 4th DCA 1976) (*quoting from Biakanja v. Irving,* 49 Cal.2d 647, 650, 320 P.2d 16, 19 (1958)). *See Licata v. Spector,* 26 Conn.Supp. 378, 225 A.2d 28 (C.P.1966). The liability of an attorney to an intended beneficiary under a will exists because:

> "[w]hen an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. Indeed, the executor of an estate has no standing to bring an action for the amount of the bequest

> against an attorney who negligently prepared the estate plan, since in the normal case the estate is not injured by such negligence except to the extent of the fees paid; only the beneficiaries suffer the real loss.... [U]nless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated."

Heyer v. Flaig, 70 Cal.2d 223, 228, 74 Cal.Rptr. 225, 228–29, 449 P.2d 161, 164–65 (1969)

Not until today has any court suggested that an attorney's liability to an intended beneficiary of a will is limited to cases in which the attorney forgets or ignores the testator's specific instruction. Certainly, no important public policy is served by distinguishing between the negligence of an attorney who fails to do what the client has told him to do, and the negligence of an attorney who does what the client has told him to do in a negligent manner, or, as here, does what the client has told him to do, but fails to advise the client that what the client wants done cannot legally be done. Indeed, these latter forms of negligence are, as they should be, unhesitatingly recognized as actionable when brought by intended beneficiaries. *See Heyer v. Flaig,* 449 P.2d 161 (daughters, intended sole beneficiaries of estate, have cause of action against attorney who negligently failed to include in will provision to pretermit testator's "post-testamentary spouse"); *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) (doctrine of privity no bar to cause of action against attorney by intended beneficiaries under will where testamentary trust created therein was declared invalid as violating rule against perpetuities; cause of action barred, however, because confusion surrounding rule against perpetuities prevents finding of negligence); *Garcia v. Borelli,* 129 Cal.App.3d 24, 180 Cal.Rptr. 768 (1982) (child and grandchildren of testator have cause of action against attorney who "negligently and carelessly advised decedent" that declarations in will referring to testator's property as "separate" and "community" sufficiently established the character of the property so as to make it subject to testamentary disposition); *Bucquet v. Livingston,* 57 Cal.App.2d 914, 129 Cal.Rptr. 514 (1976) (beneficiaries of inter-vivos trust have cause of action against attorney who failed to advise settlor that provision giving power of revocation to settlor's wife rendered nonmarital half of trust includable in wife's estate resulting in adverse tax consequences and ultimate financial loss to beneficiaries); *McAbee v. Edwards,* 340 So.2d 1167 (daughter, intended sole beneficiary of estate, has cause of action against attorney who allegedly misadvised testator that it was unnecessary to change will in order to pretermit husband, whom testator married after will was executed). [7]

***321** I am equally, if not more, disturbed by the majority's conclusion that because there is no expression in the will as to what is to happen upon the failure of the "primary" devise "expressed in the will," that therefore Mr. Johnson had no intent to provide for his mother if a life estate in the homestead could not be devised. The majority's insistence that the appellant is an intended beneficiary of the will only if she could receive a life estate in the homestead is unfounded. Plainly, Mr. Johnson's intent to make his mother a substantial beneficiary of his estate is discernible from the will, and the reason, of course, that the will contains no secondary or alternative devise to the mother is that the testator allegedly was never informed that any was necessary.

In *Ogle v. Fuiten,* 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984), the reciprocal wills of Alma and Oscar Smith gave the survivor the estate of the other, if the survivor survived more than thirty days, and, in a separate clause, gave their nephews, the Ogles, the entire estates in the event that the Smiths died in a common disaster. Alma Smith died of cancer fifteen days after her husband died of a stroke. Since the wills contained no other dispositive provisions, the estates passed by intestacy to persons other than the Ogles. The Ogles sued the attorney who prepared the wills, asserting, *inter alia,* that it was the testators' intention that their property go to the Ogles if, as happened, neither of the Smiths survived the other by thirty days.

The attorney argued that the Ogles could not prevail, "because the testators' intent ... shows that plaintiffs were to benefit only under certain circumstances [common disaster] which did not occur," and that, therefore, "the intent of the testators to benefit plaintiffs is not, as required, ... 'clearly evident.' " *Id.* at 774, 466 N.E.2d at 226. He further argued that *Heyer, Lucas, Licata, McAbee* and the like, all permitting a cause of action by the intended beneficiary, were distinguishable on the ground that in each of those cases, "the intent of the testator was expressly shown by the will." *Id.* at 775, 466 N.E.2d at 227. The court, finding no authority supporting the rule urged by the attorney, rejected the attorney's argument.

The only possible justification for the requirement that the testamentary intent be "expressed in the will," *see DeMaris v. Asti,* 426 So.2d 1153, 1154 (Fla. 3d DCA 1983), is to guard against the onslaught of fraudulent claims. But where, as here, the claim is made by a person "whose benefit is so direct and substantial and so closely connected with that of the promisee [testator] that it is economically desirable to let [him or her] enforce it," *Stowe v. Smith,* 184 Conn. 194, 197, 441 A.2d 81, 83 n. 1 (1981) (*quoting* 4 A. Corbin, *Contracts* § 786 (Supp.1971)), and, a fortiori, where, again as here, the will on its face shows an intent by the testator to provide shelter or its equivalent for his mother during her lifetime in the event of his death, [8] the envisioned horribles are of no concern, and there is thus no justification whatsoever to preclude the mother's action. [9]

Although it may be said that to permit a finding of liability in this case is to contribute to the progressive "assault upon the citadel of privity," [10] it seems to me that to absolve the attorney is to take a giant step ***322** backwards. *See Licata v. Spector,* 225 A.2d at 31. As one court has reasoned:

> "First, neither of the rationales supporting the requirement of privity applies to the situation presented. This is not a case in which the ability of a nonclient to impose liability would in any way affect the control over the contractual agreement held by the attorney and his client, as the interests of the [testator] and the intended beneficiary with regard to the proper drafting and execution of the will are the same. [11] Additionally, this duty does not extend to the general public but only to a nonclient who was the direct and intended beneficiary of the attorney-client relationship.
>
> "Second, it is obvious that 'the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will....' "
>
> *Needham v. Hamilton,* 459 A.2d 1060, 1062–63 (D.C.1983) (footnote added; citations omitted).

Accordingly, I would reverse and remand for further proceedings.

All Citations

467 So.2d 315, 10 Fla. L. Weekly 327

Footnotes

1 There is no dispute over the determination that the residence was Johnson's homestead within the meaning of the Florida Constitution, and that it was not subject to devise because Johnson was survived by a minor child. Art. X, § 4(c), Fla. Const.; § 732.4015, Fla.Stat. (1981).

2 It is apparent that either Johnson's spouse predeceased him or their marriage had been dissolved. Therefore, in accordance with the Florida Statutes, the homestead passed directly to Johnson's children. *See* § 732.401(1); § 732.103(1).

3 Proof of this first element generally establishes that the attorney owes a duty to the plaintiff. The two principal justifications relied upon for the retention of the privity requirement in legal malpractice actions are: (1) to allow such liability without privity would deprive the parties to the contract of control of their own agreement; and (2) a duty to the general public would impose a huge potential burden of liability on the contracting parties. *See generally* Annot., 45 A.L.R.3d 1181.

4 We make no determination as to whether Weinstein's action in the present case amounted to a breach of duty owed to his client. Such a determination is to be left to the finder of fact in an appropriate case.

5 Declarations made by the testator concerning the disposition of his property are not admissible to show that he intended to dispose of his property in a particular manner not evidenced by the will.

> While parol evidence is admissible for the purpose of interpreting something actually written in the will, it cannot be admitted for the purpose of adding to the will something which does not appear on the face of the instrument.
>
> It is not the rule of evidence which excludes extrinsic facts in contradiction to a will, but rather the Statute of Wills. The statute of wills requires all testamentary conveyances to be in writing and executed with certain prescribed formalities. [footnote omitted]

1 T.A. Thomas & D.T. Smith, Florida Estates Practice Guide ch. 16, § 38 (1984). *See* § 732.502, Fla.Stat. (1981). The danger of perjury is the reason behind the statutory provisions which regulate wills and is also generally considered the reason for the rule which prohibits the use of evidence extrinsic to the will to prove a testator's intent. *See* 4 Bowe-Parker; Page on Wills § 32.9, at 271 (4th ed. 1961).

6 The dissent would have us overrule a recent decision of this court which holds that in an action of this nature, the testamentary intent that has allegedly been frustrated must be expressed in the will. *See DeMaris.* The law is now established here and in most jurisdictions that an attorney becomes liable to a testamentary beneficiary only if the testamentary intent, *as expressed in the will,* is frustrated by the attorney's negligence and the beneficiary's legacy is lost or diminished as a direct result of that negligence. *DeMaris. Accord Ventura County Humane Soc'y for Prevention of Cruelty to Children & Animals v. Holloway,* 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (Ct.App.1974). *See also supra* note 5. While we recognize that the plaintiff was in fact an intended beneficiary of the decedent's will, she may recover under this theory only the deficit that results from a frustrated testamentary intent *expressed in the will.* To permit the plaintiff to prove that the testamentary intent was other than that expressed in the will not only would run contrary to the avowed purpose of the statute of wills to guard against fraud, but also would open the door to "the fabled triplets of conjecture, speculation and surmise," *Pena v. Allstate Ins. Co.,* 463 So.2d 1256 (Fla. 3d DCA 1985) (Schwartz, C.J., dissenting), which have never entitled a litigant to affirmative relief.

While the court in *Ogle v. Fuiten,* 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984), relied upon by the dissent, rejected the rule that only the testator's intent, as expressed in the will, is relevant in a legal malpractice action brought by an intended beneficiary, the court's decision was premised on its failure to find any authority supporting such a rule. In the present case, we have not only found authority for the rule, but that authority is a prior decision of this very court. *See DeMaris. Accord Holloway. See supra* note 5. In addition, we note that it was conceded in *Ogle* that under Illinois law privity is not a prerequisite to an action by a nonclient against an attorney. 80 Ill.Dec. at 774, 466 N.E.2d at 226. *See Pelham v. Griesheimer,* 92 Ill.2d 13, 64 Ill.Dec. 544, 440 N.E.2d 96 (1982). Florida law, however, is to the contrary. In fact, this court has specifically held that in a legal malpractice action, the plaintiff must prove the attorney's employment (privity). *Weiner,* 271 So.2d at 219. *Accord Drawdy.*

7 In this regard, *McAbee* is distinguishable. In *McAbee* a daughter sued her mother's attorney for the negligent preparation of the mother's will. The mother's testamentary intent, as expressed in the will, was that her entire estate go to the daughter. This intent was frustrated because the mother married after the execution of the will and on her death her husband claimed an interest in the estate as a pretermitted spouse. The mother had requested the attorney to redraft her will after her marriage so that the daughter would remain the sole beneficiary. The attorney advised her, however, that redrafting the will was not necessary. The court in *McAbee* held that the daughter could state a cause of action against the attorney. The attorney in McAbee could have drafted the will to avoid the husband's claim under the pretermitted spouse statute by inserting a provision in the will reflecting the testator's intent that the husband take nothing. This means of avoiding the pretermitted spouse's claim against the estate was provided for in the statute itself. *See* § 731.10, Fla.Stat. (1973). In contradistinction, there was no means by which Weinstein, the attorney in the present case, could have drafted the will to avoid the effect of Florida's statutes and constitutional provisions prohibiting the devise of homestead property.

7 I concede that these cases, perhaps with the exception of *Lucas,* differ from the present case in that the attorneys there could have drafted wills which would have accomplished the testator's goal, while here no amount of will-drafting could have accomplished a testamentary devise of the homestead. But, unlike the majority, I think this difference is totally without legal significance.

8 It is certainly fair to presume this to be the broader intent of the testator, which, but for the attorney's failure to advise the testator that his intended devise would fail under Florida's homestead laws, would have been expressed in the will.

9 The majority concedes that the attorney's action or inaction, as the case may be, in this case may have amounted to a breach of duty to his *client. See* n. 4. Thus, it is only that the appellant does not come within an exception to the privity requirement, not the failure to allege negligence, that prevents the present action.

10 *Ultramares Corp. v. Touche,* 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

11 *Adams v. Chenowith,* 349 So.2d 230 (Fla. 4th DCA 1977), recedes from the rule in *McAbee* to the extent that the interests of the parties are opposing.

End of Document

629 So.2d 198
District Court of Appeal of Florida,
Fifth District.

Eric L. BOLVES, et al., Appellants,
v.
Roy Lee HULLINGER, Appellee.

No. 93–375.
|
Nov. 12, 1993.
|
Rehearing Denied Jan. 5, 1994.

Synopsis

Client filed malpractice action against attorneys who allegedly failed to file timely age discrimination suit against client's former employer. The Circuit Court, Orange County, William C. Gridley, J., entered judgment for the client and the attorneys appealed. The District Court of Appeal, Goshorn, J., held that the evidence was insufficient to show that the client had been the victim of willful age discrimination and, thus, the client failed to show that the failure to file timely age discrimination suit resulted in any damage such as the inability to recover liquidated damages under Age Discrimination in Employment Act (ADEA).

Reversed.

West Headnotes (5)

[1] Courts
Exclusive or Concurrent Jurisdiction

State and federal courts have concurrent jurisdiction over suits filed under federal Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.

[2] Release
Operation and effect in general

Release executed by client in his state age discrimination action did not release attorneys from liability for malpractice premised on failure to file timely age discrimination suit against client's former employer.

[3] Attorney and Client
Elements of malpractice or negligence action in general

Elements of legal malpractice are that attorney was employed, that attorney neglected reasonable duty, and that attorney's negligence resulted in and was proximate cause of loss to client.

8 Cases that cite this headnote

[4] Attorney and Client
Pleading and evidence

Evidence was insufficient to show that client had been victim of willful age discrimination and, thus, client failed to show that attorneys' failure to file timely age discrimination suit against client's former employer resulted in any damage to client; client was unable to prove that, but for any negligence, he would have recovered liquidated damages under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(b), as amended, 29 U.S.C.A. §§ 621 et seq., 626(b).

5 Cases that cite this headnote

[5] Civil Rights
Discharge or layoff

Civil Rights
Age discrimination

Reorganization of employer's business and elimination of older employee based on employee's poor performance, when compared to his younger peers, is nondiscriminatory basis for discharge and presents no evidence of intentional or reckless disregard needed to recover liquidated damages under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(b), as amended, 29 U.S.C.A. §§ 621 et seq., 626(b).

Attorneys and Law Firms

***199** Patrick M. Magill, Orlando, for appellants.

Carlos R. Diez–Arguelles, Orlando, for appellee.

Opinion

GOSHORN, Judge.

Eric Bolves, Esquire, Ralph Leemis, Esquire, and the partnership of Leemis and Bolves appeal the final judgment rendered against them in the attorney malpractice action filed by Roy Hullinger. Hullinger successfully argued below that he had been damaged by appellants' failure to timely file a federal age discrimination suit against Hullinger's former employer, Ryder Truck Rental, Inc. We reverse.

Hullinger was terminated by Ryder in late April, 1983. Two months later Hullinger retained appellants to act on his behalf. Appellants filed an administrative complaint with the Florida Commission on Human Relations (FCHR) and an administrative complaint with the Federal Equal Employment Opportunity Commission (EEOC) asserting the alleged age discrimination. Appellants never filed a state or federal civil suit for age discrimination. The statute of limitations expired on a cause of action under the federal Age Discrimination in Employment Act while appellants represented Hullinger.

On November 26, 1986, appellants' employment was terminated by Hullinger. Hullinger hired substitute counsel in early January, 1987.

[1] **[2]** On January 16, 1987, FCHR issued a determination of "no cause," relating to its conclusion that there was no cause to find Hullinger had been discriminated against on the basis of age. That same date, substitute counsel filed a state civil suit against Ryder.[1] ***200** The filing of the civil suit divested FCHR of jurisdiction to proceed further, and it accordingly dismissed Hullinger's administrative case. The federal EEOC file was likewise closed.

Thereafter, Hullinger's state civil suit against Ryder was dismissed based on a statute of limitations defense.[2] Two days after the trial court's dismissal of Hullinger's suit against Ryder, Hullinger filed a legal malpractice suit against appellants. Count I of the amended complaint asserts appellants negligently failed to file a federal court suit pursuant to the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. [ADEA], as amended, or inform Hullinger of his right to a federal cause of action. Hullinger alleged that as a result of appellants' negligence, his right to a federal cause of action, including double damages, was "curtailed." The jury agreed, specifically finding that Ryder had willfully discriminated against Hullinger and that appellants' negligence in failing to timely file suit damaged Hullinger.

[3] **[4]** A cause of action for legal malpractice has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client. *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). To establish the third element, Hullinger had to prove that, but for appellants' negligence in failing to timely file the ADEA claim, he would have recovered liquidated damages in an ADEA suit.

Section 626(b) of the ADEA provides that liquidated damages[3] are payable only for *willful* violations of the chapter.

> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.
>
> *Dreyer v. Arco Chem. Co.,* 801 F.2d 651 (3d Cir.1986), *cert. denied,* 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987). *See also Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). We find that the evidence offered by Hullinger to demonstrate willfulness fell short as a matter of law.

The evidence Hullinger relied on to show the violation was willful was that (1) the decision to fire him was made quickly and (2) one of Hullinger's supervisors admitted the procedures in the personnel manual for termination were not followed, the personnel office was not contacted, and neither of Hullinger's supervisors considered the ADEA when terminating Hullinger.

[5] The speed with which the decision was made was immaterial. The admission that Ryder's policy manual for termination was not consulted or followed likewise is

immaterial. There was no evidence of what the manual contained or that it was even applicable to terminations for other than disciplinary ***201** reasons. Contrary to Hullinger's assertion, Hullinger's supervisor testified that he had contacted the personnel department and that he was told there was no problem with terminating Hullinger because termination was not due to Hullinger's age. Presumably, the personnel department was aware of the ADEA because its advice was in accordance with ADEA provisions. The supervisors did not consider the ADEA because the issue of Hullinger's age never occurred to them.

It was unrebutted that the supervisors made a purely business decision necessitated by corporate reorganization. Reorganization of a business and the elimination of an older employee based on the employee's poor performance relative to younger peers is a nondiscriminatory basis for discharge of the protected employee. *Hanchey v. Energas Co.,* 925 F.2d 96 (5th Cir.1990); *Connell v. Bank of Boston,* 924 F.2d 1169 (1st Cir.), *cert. denied,* 501 U.S. 1218, 111 S.Ct. 2828, 115 L.Ed.2d 997 (1991). There was a complete absence of evidence of intentional or reckless disregard for whether Ryder's actions were in violation of the ADEA.

Because Hullinger would not have been entitled to recover liquidated damages under a federal cause of action, Hullinger should not have been permitted to recover damages from appellants in the legal malpractice suit. Appellants' negligence in allowing the statute of limitations to expire on the federal claim did not result in damage to Hullinger. Accordingly, the final judgment in favor of Hullinger is reversed.

REVERSED.

GRIFFIN and DIAMANTIS, JJ., concur.

All Citations

629 So.2d 198, 18 Fla. L. Weekly D2397

Footnotes

1 There is concurrent jurisdiction between the state and federal courts in age discrimination suits filed under the federal act. *Chapman v. City of Detroit,* 808 F.2d 459, 463 (6th Cir.1986) ("There can be no doubt that the state courts have concurrent jurisdiction with the federal courts under the ADEA"). Thus, the federal ADEA claim could have been pursued in state court had the claim been timely asserted.

2 On appeal from the dismissal, this court upheld the trial court's conclusion that a two-year statute of limitations governs claims brought under section 760.10. *Hullinger v. Ryder Truck Rental, Inc.,* 516 So.2d 1148 (Fla. 5th DCA 1987). The supreme court reversed this court's holding, finding instead that a four year statute of limitations applied. *Hullinger v. Ryder Truck Rental, Inc.,* 548 So.2d 231 (Fla.1989). Upon remand, Ryder and Hullinger settled the suit. For $65,000, Hullinger agreed to release Ryder. The release of Ryder did not act as a release of appellants. *See Keramati v. Schackow,* 553 So.2d 741 (Fla. 5th DCA 1989) (holding that clients were not barred by *res judicata,* collateral estoppel, or estoppel *in pais* from bringing legal malpractice action against attorneys who had represented them in earlier case, even though earlier case was settled and the clients had certified that the settlement was "full and just."). *See also King v. Jones,* 258 Or. 468, 483 P.2d 815 (1971) (holding that the client's release of an original tort-feasor after the statute of limitations has run does not bar the client's malpractice action against the attorneys responsible for letting the statute of limitations expire).

3 Liquidated damages, if allowed, are in the amount equivalent to the compensatory damages awarded plaintiff for his lost earnings and benefits. The jury here found the amount of damages sustained by Hullinger for "lost earnings and benefits" to be $139,500.

876 F.Supp. 1270
United States District Court,
M.D. Florida,
Orlando Division.

.

James C. ORR, Trustee, Plaintiff,
v.
BLACK & FURCI, P.A., Roy Black, Defendants.

No. 93–642–CIV–ORL–18.
|
Feb. 3, 1995.

Synopsis
Chapter 11 trustee for debtor who pled guilty to money laundering sued debtor's criminal defense attorney alleging malpractice, breach of fee agreement, and seeking accounting of attorney's expenses and rescission of fee agreement. On attorney's motion for summary judgment, the District Court, G. Kendall Sharp, J., held that: (1) under Florida law, criminal defendant who pled guilty to crime was required to prove his innocence in order to maintain cause of action for malpractice against criminal defense attorney; (2) breach of contract claim against attorney that alleged only attorney's negligence had to contain allegation of innocence by criminal defendant; (3) fee agreement would not be rescinded on ground it was unconscionable; and (4) trustee was not entitled to accounting.

Motion granted.

West Headnotes (10)

[1] Attorney and Client
Conduct of litigation

Under Florida law, trustee for Chapter 11 debtor who pled guilty to money laundering had to establish debtor's innocence in order to maintain legal malpractice action against debtor's criminal defense attorney.

[2] Attorney and Client
Pleading and evidence

Under Florida law, generally, in claim for legal malpractice, client must plead and prove attorney's employment; attorney's neglect of reasonable duty; and that attorney's negligence resulted in and was proximate cause of loss to client.

1 Cases that cite this headnote

[3] Attorney and Client
Trial and judgment

Under Florida law, although proximate causation in legal malpractice action ordinarily is a factual issue, in certain cases proximate cause may be determined as matter of law, based on fairness and considerations of public policy.

2 Cases that cite this headnote

[4] Attorney and Client
Conduct of litigation

Under Florida law, when criminal defendants plead guilty to crime, as malpractice plaintiffs, they must prove their innocence in order to maintain cause of action for legal malpractice against their criminal defense attorney.

4 Cases that cite this headnote

[5] Attorney and Client
Trial and judgment

Under Florida law, breach of contract claims brought by trustee for Chapter 11 debtor who pled guilty to money laundering against criminal defense attorney that alleged only attorney's negligence in fulfilling his duties had to contain allegation of debtor's innocence.

[6] Attorney and Client
Conduct of litigation

Criminal defense attorney for Chapter 11 debtor could not be held liable for breaching fee agreement due to his failure to appear at debriefing sessions, where attorney was only retained to represent defendant in criminal proceedings then pending, and, in plea agreement between government and defendant

both federal government and state agreed not to charge defendant with any crime to which defendant admitted during course of debriefing sessions, so that any information gleaned from defendant in debriefings could not be used in criminal proceedings for which defense counsel had been retained.

[7] Attorney and Client

Making, requisites, and validity

Attorney fee agreement between Chapter 11 debtor and debtor's defense counsel could not be set aside as unconscionable after debtor pled guilty, even though debtor claimed that fee charged was excessive when one considered amount of work done by attorney to earn it, where fee agreement provided that no portion of fee would be returned if case was resolved without going to trial.

[8] Attorney and Client

Requisites and validity of contract

Generally, reasonableness of attorney's fee agreements and other contracts is evaluated as it appeared to parties at time contract was entered into.

[9] Attorney and Client

Construction and operation

That criminal proceeding for which attorney was retained to represent defendant ended in entry of guilty plea and that defendant retained another attorney who performed substantial amount of work did not suggest that accounting was appropriate pursuant to request of criminal defendant's Chapter 11 bankruptcy trustee, where fee agreement specifically provided that attorney would represent defendant for flat fee of $250,000 plus costs and that if case were settled in any other manner than by contested trial, no part of fee was to be returned.

[10] Attorney and Client

Construction and operation

Under Florida law, that criminal defense attorney was terminated as defendant's counsel prior to providing full representation did not entitle bankruptcy trustee for criminal defendant to accounting, where money paid to attorney for representation of defendant was not retainer to be earned through hourly fee but instead was a flat fee for attorney's representation, payable regardless of number of hours spent working on case.

Attorneys and Law Firms

***1272** Kevin F. Foley, Maguire, Voorhis & Wells, P.A., Orlando, FL, for plaintiff.

Robert A. Soriano, James B. Baldinger, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL, Scott A. Kornspan, Black & Seiden, P.A., Miami, FL, for defendants.

ORDER

G. KENDALL SHARP, District Judge.

This case is before the court on Defendants' motion for summary judgment. Plaintiff James C. Orr (Orr) is the Chapter 11 Trustee of Timothy S. Brumlik's (Brumlik) and Patricia Brumlik's estate in the related bankruptcy case, No. 91–03720–6C1. Orr brought this case against Defendants Black & Furci, P.A. and Roy Black (Black), alleging that Black was negligent in his representation of Brumlik in a federal criminal matter in 1990. Orr seeks damages for professional malpractice and for breach of contract, an accounting of Roy Black's expenses in representing Brumlik, and rescission of the Fee Agreement between Black and Brumlik. Upon review of the case file and the applicable law, the court concludes that Defendants are entitled to summary judgment on all counts.

I. Facts

Timothy S. Brumlik was arrested on September 15, 1989, pursuant to an undercover operation conducted by the Florida Department of Law Enforcement (FDLE) and the Internal Revenue Service (IRS). This arrest ultimately led

to a six count federal indictment for money laundering, forfeiture, wire fraud, and attempting to import cocaine. Brumlik's potential exposure under this indictment included life imprisonment. Brumlik retained Black & Furci, P.A. to represent him in the criminal proceeding in the United States District Court, Middle District of Florida in Orlando. On October 18, 1989, Roy Black and Brumlik signed a Fee Agreement wherein Black agreed to represent Brumlik in the specific criminal proceedings then against him in exchange for $250,000 plus expenses. The fee was to include representation "up to the filing and arguing of a motion for a new trial; it includes interlocutory appeals, but not an appeal from a final judgment of guilt...." (Fee Agreement). The Fee Agreement also provided that "should the case be settled in any other manner than by contested trial, no part of the fee is to be returned." The Brumliks ultimately paid $301,435 in fees and costs to Black & Furci. The Brumliks also retained James Russ (Russ) to serve as co-counsel in the case.

The lead FDLE agent in the investigation against Brumlik, Juan (Tony) Iturrey (Iturrey), also was arrested in late October 1989. Iturrey was charged with violating federal bribery laws, because he forced the confidential informant in the Brumlik case to pay a portion of the informant's reward to him. Conversations between Iturrey and the informant were recorded. Black filed a motion to require the government to provide copies of these tapes. The information contained on these tapes, including a statement by Iturrey that Brumlik was not a money launderer, was such that the government acknowledged that it might have to provide them to Brumlik's attorneys as exculpatory information under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Black and Russ began to investigate the facts and law of the case and to prepare for trial. Before translating all of the Iturrey-informant tapes (from Spanish), Black and Russ recommended that Brumlik plead guilty to a reduced charge. On January 12, 1990, Brumlik's attorneys met with Assistant United States Attorney Ronald Hayward and two IRS agents for a lengthy settlement conference. Out of this conference emerged a Plea Agreement, to which Brumlik agreed on January 19. On January 22, Brumlik pled guilty to a superseding information charging him with one count of money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) (1988). At the arraignment, Brumlik admitted that he had committed the crime charged. Brumlik explained to the court that a man had approached him seeking to purchase real estate ***1273** with money obtained from illegal drug sales. Despite this fact, Brumlik agreed to sell a piece of real estate to the individual. With this explanation, the court accepted Brumlik's guilty plea.

The Plea Agreement specified that Brumlik would "cooperate fully with the government and ... testify ... in connection with the charges in this case in other matters.... and mak[e] himself available for interviews by law enforcement officials." In turn, the government agreed to consider whether such cooperation qualified as "substantial assistance," thus qualifying Brumlik for a reduced sentence. In addition, the government agreed not to charge Brumlik with any additional crimes to which he admitted during any interviews with the law enforcement personnel. The Plea Agreement did not provide for a shield protecting Brumlik from jeopardy assessments or immediate levies to be issued by the IRS based on information gained from the interviews.

In accordance with the Plea Agreement, Brumlik submitted to extensive debriefings by government agents. The government agents debriefed Brumlik for 16 or 17 full days; Black did not attend any of these sessions, while Russ attended the sessions for four days. While the plea negotiations were ongoing, Black and Russ consulted attorneys in Washington, D.C. who advised Brumlik with regard to communications matters. Black and Russ were concerned about the indirect impact of a guilty plea on Brumlik's television station licenses. The affidavit of Plaintiff's expert, John P. Hume, asserts that Black should have been aware that Brumlik also was exposing himself to potentially severe civil tax liability. Black did not advise Brumlik, however, of the potential civil tax consequences of Brumlik's debriefings.

Brumlik was sentenced on April 22, 1990. During the proceedings, Brumlik announced, "There's no question in my mind ... that I take responsibility for what I did." The court reduced Brumlik's sentence level by two units for Brumlik's acceptance of responsibility, ending with a Total Offense Level of 22, and a jail term of 48 months. The Eleventh Circuit affirmed the judgment of the court on appeal. *United States v. Brumlik,* 947 F.2d 912 (11th Cir.1991).

In conjunction with Brumlik's arrest the IRS had executed search warrants and seized a large amount of Brumlik's business records. The IRS was able to learn information previously unknown to it through the debriefings. On April 30, the IRS issued two jeopardy assessments, one to Brumlik and one to Brumlik and his wife, immediately executing on

the Brumliks' remaining assets. On May 1, Brumlik sent a letter to Black terminating Black & Furci's representation.

Brumlik collaterally attacked his sentence pursuant to 28 U.S.C. § 2255 (1988), claiming that he received ineffective assistance of counsel. Brumlik claimed that his counsel had failed to object to the government's failure to file a downward departure motion or to recommend the lower end of the sentencing guidelines range, based on Brumlik's cooperation with law enforcement officials. Also, Brumlik asserted that his counsel had failed to object to the use of sting money to enhance his offense level. Both of these claims were denied by the court, holding that "Defendant has not met his burden of demonstrating that counsel's conduct fell below an objective standard of reasonableness.... [and] has not shown prejudice with regard to this matter, as it was within the Government's discretion to file a substantial assistance motion, and the Court was not required to accept the Government's recommendations."

II. Legal Discussion

Orr has filed suit as Chapter 11 Trustee of the Brumlik estate against Black & Furci, P.A. and Black, on four state law counts. Count I calls for an accounting of the funds Brumlik gave to Black for legal representation. Count II alleges breach of the Fee Agreement between Black and Brumlik, and requests damages on the agreement. Count III alternatively seeks rescission of the Fee Agreement. Finally, Count IV asserts that Defendants are liable for professional malpractice for Black's representation of Brumlik. Defendants have filed a motion seeking summary judgment on all counts pursuant to Federal Rule of Civil Procedure 56. The court will address the professional malpractice ***1274** claim first, followed by the contract claims and the request for an accounting.

A. *Summary Judgment Standards*

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. at 2511. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248, 106 S.Ct. at 2510.

The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513–14; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538 (1986). The moving party may rely solely on his pleadings to satisfy this burden. *Celotex,* 477 U.S. at 323–24, 106 S.Ct. at 2552–53; Fed.R.Civ.P. 56(c).

"[A]ll that is required [to proceed to trial] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. at 2510 (quoting *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 288–89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). Summary judgment is mandated, however, "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552.

B. *Professional Malpractice*

[1] Orr has claimed that Black was negligent in representing Brumlik, because he failed to take proper account of the Iturrey tapes, and because he failed to properly protect Brumlik from the civil tax consequences of his guilty plea. In his motion for summary judgment, Black asserts that an attorney should not be liable for malpractice in a criminal case unless the prospective plaintiff is innocent of the crime for which he was tried. Black also claims that Orr is collaterally estopped from raising the issue of malpractice with regard to Black's representation of Brumlik in the criminal case, because Brumlik's motion for habeas corpus based on ineffective assistance of counsel was denied. Finally, Black asserts that he should not be held liable for any tax problems indirectly caused by Brumlik's debriefing because

those issues were outside the scope of Black's responsibility, which was strictly limited to the criminal proceeding.

[2] Generally, in a claim for legal malpractice plaintiffs must plead and prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client/plaintiff. *See Mayo v. Engel,* 733 F.2d 807, 811 (11th Cir.1984) (interpreting Florida law). Black asserts that the court should determine as a matter of law that a malpractice plaintiff's criminal conduct is the proximate cause of any loss a plaintiff suffers as a result of that conduct. Although a number of states have considered the situation, the issue apparently is one of first impression in Florida. This court therefore must interpret Florida law to determine what rule Florida courts most would likely adopt. *See Nichols v. Anderson,* 837 F.2d 1372, 1375 (5th Cir.1988).

***1275** Most of the states considering the issue have determined that a plaintiff in a malpractice action must establish his innocence in order to establish the attorney's liability. Some state courts have fashioned requirements that malpractice plaintiffs obtain post-conviction relief from their criminal trials, including an exoneration of their criminal charge, before any "harm" can be established for a malpractice action. *See, e.g., Stevens v. Bispham,* 316 Or. 221, 851 P.2d 556 (1993); *Shaw v. State, Dep't of Admin.,* 816 P.2d 1358 (Alaska 1991); *but see Gebhardt v. O'Rourke,* 444 Mich. 535, 510 N.W.2d 900 (1994). This conclusion has been referred to as the "no relief-no harm" rule. Because the harm does not occur until post-conviction relief is granted, the statute of limitations for bringing a malpractice action is tolled until relief is granted. *See Stevens, supra,* 851 P.2d at 566.

Rather than declare that criminal defendants/malpractice plaintiffs have suffered no harm until their conviction has been overturned, other courts have held that plaintiffs who cannot prove their innocence have proximately caused whatever injury they suffer as a result of their conviction. *See, e.g., Streeter v. Young,* 583 So.2d 1339 (Ala.1991); *Carmel v. Lunney,* 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987); *Peeler v. Hughes & Luce,* 868 S.W.2d 823 (Tex.Ct.App.1993). These courts have so ruled on the basis of various public policy rationales. In *Carmel,* for example, the New York Court of Appeals declared, "[B]ecause criminal prosecutions involve constitutional and procedural safeguards designed ... to protect criminal defendants from overreaching governmental actions ... criminal malpractice cases [are] unique, and policy considerations require different pleading and substantive rules." 518 N.Y.S.2d at 608, 511 N.E.2d at 1128; *see also* Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?,* 59 Fordham L.R. 719, 731 (1991). Courts have been reluctant to permit plaintiffs to sue their attorneys when they are guilty of the crime for which they were tried, or to which they pled guilty in order to avoid a trial. "[T]he purpose of criminal and civil trials is to discover the truth, and if the truth is that the defendant committed unlawful acts which constitute the crime ... charged, he will not be able to collect damages for the discovery of the truth." *Bailey v. Tucker,* 533 Pa. 237, 621 A.2d 108, 113 (1993). In cases where "a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial." *Id.*

However, in *Krahn v. Kinney,* 43 Ohio St.3d 103, 538 N.E.2d 1058 (1989), the Ohio Supreme Court explicitly rejected the idea that criminal malpractice plaintiffs must prove their innocence to present a cognizable claim. The court reasoned that even though a plaintiff may plead guilty to a crime, he may still have been harmed and should be able to maintain a malpractice action against his attorney. As the court stated, "[The plaintiff] may have made a valid plea on the day of trial, but she would have been better served had she accepted the earlier bargain.... [T]he injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record.' " *Krahn,* 538 N.E.2d at 1061 (quoting Court of Appeals). Ohio, therefore, legally recognizes that harm may result from negligent representation in a criminal trial even when the defendant is guilty of the crime.

Although no Florida court has ruled on this specific issue, the Florida Supreme Court has decided that collateral estoppel should apply to criminal defendants who raise unsuccessful ineffective assistance of counsel claims and then seek damages for attorney malpractice. *Zeidwig v. Ward,* 548 So.2d 209 (Fla.1989). As the court stated, "If we were to allow a claim in this instance, we would be approving a policy that would approve the imprisonment of a defendant for a criminal offense ... but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned. To fail to allow the use of collateral estoppel in these circumstances is neither logical nor reasonable." *Zeidwig,* 548 So.2d at 214.

[3] In Florida, "proximate causation ... is concerned with whether and to what extent ***1276** the defendant's conduct foreseeably and substantially caused the specific injury that

occurred." *McCain v. Florida Power Corp.,* 593 So.2d 500, 502 (Fla.1992). While proximate causation ordinarily is a factual issue, in certain cases proximate cause may be determined as a matter of law, based on fairness and considerations of public policy. *See Sakon v. Pepsico, Inc.,* 553 So.2d 163 (Fla.1989); *Stahl v. Metropolitan Dade County,* 438 So.2d 14 (Fla.Dist.Ct.App.1983). The policy announced in *Zeidwig* against permitting criminal defendants two opportunities to prove that their representation was inadequate dovetails with the policies announced by states requiring innocence to bring a malpractice claim. In accordance with this policy, it is the criminal defendant's guilty conduct that foreseeably and substantially causes the injuries that occur as a result of his conviction. The court concludes that Florida courts would agree with the majority rule, and "accept as the proximate cause ... of all damages which occurred to [plaintiff] by reason of [the indictment], his guilt and his guilt alone." *Weiner v. Mitchell, Silberberg & Knupp,* 114 Cal.App.3d 39, 170 Cal.Rptr. 533, 538 (1980).

[4] The appropriateness of this rule is particularly evident in this situation, where Brumlik pled to a superseding information that represented a significant reduction in his exposure to criminal liability. Presumably, this reduction was the result of negotiation by Brumlik's attorneys. Accordingly, the court holds that when criminal defendants plead guilty to a crime, as malpractice plaintiffs they must prove their innocence in order to maintain a cause of action against their attorney. The court limits its holding to situations in which the malpractice plaintiff pleads guilty, and does not speak to the somewhat different situation where a criminal defendant maintains his innocence throughout a criminal trial. Therefore, the court grants the Defendants' motion for summary judgment as to the professional malpractice claim. The court finds it unnecessary to evaluate Defendants' arguments as to collateral estoppel and the scope of Black's representation.

C. *Breach of Contract*

[5] Orr also asserts that Defendants breached the Fee Agreement into which they entered with Brumlik. Orr's claim focuses on an allegedly implied provision that Defendants "would represent Mr. Brumlik with professional due care in a manner normally exercised by similar (sic) situated attorneys." (Amended Complaint at 4). Because the Defendants allegedly failed to do so, Orr claims the fee that Defendants charged was unconscionable. Orr has both sought damages for breach of the contract and, alternatively, sought rescission of the contract.

This claim for breach of contract in essence restates the claim based on professional malpractice. Rather than assert that Defendants completely failed to fulfill any of their obligations under the Fee Agreement, Orr's claim rests on the allegation that Black was negligent in performing his duties. Since the court has held that criminal malpractice claims may not be maintained by plaintiffs who do not assert their innocence, it would be illogical to permit malpractice plaintiffs to circumvent this rule by alleging the same facts under a claim for breach of contract. Accordingly, the court holds that breach of contract claims that allege only an attorney's negligence in fulfilling his duties must contain an allegation of innocence by the plaintiff.

[6] Orr may be understood to argue that Black failed to adhere to the contract by not appearing with Brumlik during the debriefing sessions. The contract makes clear, however, that Black was only retained to defend Brumlik in the criminal proceedings then pending. Under Florida law, "it is not sufficient merely to assert an attorney-client relationship existed between the parties; it is essential to allege the relationship existed with regard to the acts or omissions upon which the malpractice claim is based." *Maillard v. Dowdell,* 528 So.2d 512, 514 (Fla.Dist.Ct.App.1988), *rev. denied* 539 So.2d 475 (Fla.1988); *see also Dahl–Eimers v. Mutual of Omaha Life Ins. Co.,* 986 F.2d 1379, 1382 (11th Cir.1993) (noting that courts may not rewrite contracts to create ambiguity). In the Plea Agreement into which the government and Brumlik entered, both the federal ***1277** government and the State of Florida agreed not to charge Brumlik with any other crime to which the defendant admitted during the course of the debriefing sessions (Plea Agreement at 3, 5). Any information gleaned from Brumlik in the debriefings, then, could not be used against him in the criminal proceedings for which Black had been retained in the Fee Agreement. Therefore, Black cannot be held liable for breaching the Fee Agreement for his failure to appear at the debriefing sessions. Black did represent Brumlik at his arraignment and sentencing, and it is clear from the transcripts of both proceedings that Black was a zealous advocate in Brumlik's behalf. The court holds that Black did not breach the Fee Agreement.

[7] **[8]** Orr has not asserted that the Fee Agreement was unconscionable at the time the parties entered into it; rather he claims that the fee charged should be deemed excessive now when one considers the amount of work done by Black to earn it. As Plaintiff's expert claims, "[F]rom the date of the

fee agreement, looking forward, the fee was not excessive; however, looking back today, it is obvious that due to Mr. Black's negligence, the fee was excessive." (Affidavit of John P. Hume at 3). Generally, however, the reasonableness of attorney's fee agreements and other contracts is evaluated "as it appeared to the parties at the time the contract was entered into." *Setzer v. Robinson,* 57 Cal.2d 213, 18 Cal.Rptr. 524, 368 P.2d 124, 127 (1962) (quoting *Youngblood v. Higgins,* 146 Cal.App.2d 350, 303 P.2d 637, 639 (1956)). The fee agreement contemplated that the case might be resolved without going to trial; in that event the contract provided that no portion of the fee be returned. The court cannot hold that the contract was unconscionable when the parties agreed to its terms. Further, holding that the agreement is unconscionable because of Black's alleged negligence is inappropriate for the reasons stated above. Accordingly, the court grants Defendants' motion for summary judgment with regard to Counts II and III of the amended complaint.

D. *Accounting*

[9] Orr has also requested an accounting, on the ground that the attorney's fee was grossly excessive and unreasonable, since the criminal proceeding ended in the entry of a guilty plea and because Brumlik retained another attorney who performed a substantial amount of the work. The Fee Agreement specifically provided that Black would represent Brumlik for a flat fee of $250,000 plus costs, and "should the case be settled in any other manner than by contested trial, no part of the fee is to be returned." (Fee Agreement). Brumlik also freely chose to retain Russ as Black's co-counsel. Neither of these factors suggest that an accounting is appropriate in this case.

[10] Orr asserts that he is entitled to an accounting because Black was terminated as counsel prior to providing full representation. The money paid to Defendants for their representation of Brumlik was not a retainer to be earned through an hourly fee; the fee agreement established a flat fee for Brumlik's representation, payable regardless of the number of hours spent working on the case. Orr cites *The Florida Bar v. Grusmark,* 544 So.2d 188 (Fla.1989), to support his position that even in this situation he is entitled to an accounting. In *Grusmark,* the client paid an attorney a flat fee of $5,000 to be represented in a criminal proceeding. The attorney worked four or five hours on the case, and prepared only for a bond hearing to release the client from jail. Immediately thereafter, the client terminated the attorney. The Florida Supreme Court held that because the attorney had been fired without having represented the client through the bulk of the criminal proceeding, the client was entitled to an accounting of funds that had not been reasonably expended. *Id.* at 190.

Though there are some similarities, *Grusmark* does not control this case. Here, Black represented Brumlik through plea negotiations, the entry of Brumlik's guilty plea, and sentencing. He fulfilled every obligation for which he was responsible under the Fee Agreement between the parties. The only recourse from the criminal proceedings that remained for Brumlik when Black was terminated ***1278** was an appeal from the judgment, for which Black explicitly was not responsible. Accordingly, the court holds that an accounting is not justified in this case, and grants Defendants' motion for summary judgment with regard to Count I.

III. Conclusion

The court **GRANTS** Defendants' motion for summary judgment (Doc. 127) on all four counts of Orr's complaint. Because Orr cannot allege Brumlik's innocence as to the underlying money laundering charge, Orr's professional malpractice claim cannot be maintained. Also, the court concludes as a matter of law that Black fulfilled the requirements of the Fee Agreement, and that the Fee Agreement was not unconscionable. Therefore, Orr's breach of contract claim and request for rescission must fail. Finally, the court finds that Orr is not entitled to an accounting of the funds paid to Defendants pursuant to the Fee Agreement. The court instructs the clerk of the court to enter judgment accordingly.

It is **SO ORDERED**.

All Citations

876 F.Supp. 1270

621 So.2d 507
District Court of Appeal of Florida,
Second District.

Virginia E. JOHNSON, and Virginia E. Johnson,
as personal representative of the estate of
Philip H. Johnson, deceased, Appellants,
v.
ALLEN, KNUDSEN, DeBOEST, EDWARDS
& RHODES, P.A., f/k/a Allen, Knudsen,
Swartz, DeBoest, Rhodes & Edwards,
P.A., a Florida professional association,
and George T. Swartz, Appellees.

No. 92–02131.
|
July 2, 1993.

Synopsis
Law firm brought action against clients for payment of fees, and clients counterclaimed and brought third-party claims for legal malpractice. The Circuit Court, Lee County, R. Wallace Pack, J., dismissed counterclaim and third-party complaint, and clients appealed. The District Court of Appeal, 557 So.2d 872, dismissed portion of appeal seeking review of order dismissing counterclaim for lack of jurisdiction. The District Court of Appeal, 566 So.2d 327, subsequently vacated and remanded. Law firm dismissed complaint, thus order of dismissal of counterclaim became final and appealable. On appeal, the District Court of Appeal, 580 So.2d 333, vacated and remanded. After clients filed amended counterclaims and third-party claims, the trial court granted summary judgment for law firm and third-party defendant as based on applicable statutes of limitations. Clients appealed. The Second District Court of Appeal, held that clients' counterclaim survived law firm's dismissal of its complaint.

Reversed and remanded with directions.

West Headnotes (4)

[1] Set–Off and Counterclaim
Effect of Failure to Assert or Claim; Compulsory Counterclaim

Clients' legal malpractice counterclaim was based on same representation for which law firm sought to recover fees; therefore, it arose out of the same transaction or occurrence as law firm's original action, and was a compulsory counterclaim. West's F.S.A. RCP Rule 1.170.

4 Cases that cite this headnote

[2] Limitation of Actions
Set-Offs, Counterclaims, and Cross-Actions

Statutes of limitation do not apply to compulsory counterclaims.

3 Cases that cite this headnote

[3] Appeal and Error
Determination of Part of Controversy

Dismissal of compulsory counterclaim with prejudice is not considered a final disposition and is, thus, not appealable until a final disposition of the original cause has been obtained on the merits.

8 Cases that cite this headnote

[4] Appeal and Error
On Motion Relating to Pleadings

Pretrial Procedure
Counterclaim or Other Request for Affirmative Relief, Effect Of

Clients' counterclaim remained pending where it was dismissed with prejudice and clients could not seek review until disposition of law firm's original cause, and, thus, to allow a voluntary dismissal of the original cause to otherwise cut off clients' rights under the counterclaim would violate Rules of Civil Procedure. West's F.S.A. RCP Rule 1.420(a)(2).

6 Cases that cite this headnote

Attorneys and Law Firms

***507** J. Michael Coleman, Asbell, Hains, Doyle & Pickworth, P.A., Naples, for appellants.

Gerald W. Pierce, Henderson, Franklin, Starnes & Holt, P.A. Fort Myers, for appellees.

Opinion

PER CURIAM.

We find no error in the trial court's order granting summary judgment in favor of George T. Swartz, one of the appellees herein. We agree with the appellants, Philip H. and Virginia E. Johnson, however, that the trial court erred in granting summary judgment in favor of Allen, Knudsen, DeBoest, Edwards, & Rhodes, P.A. (Allen, Knudsen), the other appellee herein. We therefore reverse the trial court's order in part.

This case is before us for the fourth time on appeal. *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.,* 580 So.2d 333 (Fla. 2d DCA 1991), hereinafter to be referred to as *Johnson III,* was the third such appeal. In *Johnson III,* this ***508** court succinctly set forth the relevant facts and procedural history of this case as follows:

> Allen, Knudsen ... sued the Johnsons for attorneys' fees earned by litigation in 1984 and 1985. The Johnsons counterclaimed for malpractice committed during the litigation and during real property transactions giving rise to the litigation. The Johnsons also filed a third party complaint against George Swartz, who was associated with the law firm at the time of the malpractice. The trial court, in a single order, dismissed the counterclaim and the third party complaint based on the defense of statute of limitations. The trial court also denied the Johnsons' motion to amend their counterclaim. The Johnsons attempted to appeal the nonfinal order dismissing their counterclaim, [1] but this court denied the appeal for lack of jurisdiction. *Johnson v. Allen, Knudsen, et al.,* 557 So.2d 872 (Fla. 2d DCA 1990) (*Johnson I*). The order however was final as to Swartz, and this court accepted review in *Johnson v. Allen, Knudsen, et al.,* 566 So.2d 327 (Fla. 2d DCA 1990) (*Johnson II*). Thereafter, the law firm dismissed its complaint, [2] and the order of dismissal of the Johnsons' counterclaim became final and appealable. This order is before us again for review.
>
> We reverse for the same reasons stated in *Johnson II:* that is, that the trial court erred in going outside the pleadings to determine the effect of the statute of limitations defense, and in denying the Johnsons' motion to amend their counterclaim.

Johnson III.

After this court's holding in *Johnson III,* the Johnsons filed two amended counterclaims as to Allen, Knudsen and three amended third-party claims as to Swartz. Allen, Knudsen and Swartz thereafter filed motions for summary judgment, arguing, among other things, that the Johnsons' claims for malpractice and negligence were barred by all applicable statutes of limitation. In May 1992, the trial court entered an order granting summary final judgment in favor of both Allen, Knudsen and Swartz with regard to the Johnsons' second-amended counterclaim and third-amended third-party complaint, respectively. The Johnsons thus filed a timely notice of appeal in this court.

On appeal, the Johnsons argue that though a claim may be barred by the running of applicable statutes of limitation when that claim has been asserted in an independent action, such is not the case where that same claim is raised in a compulsory counterclaim. Though Allen, Knudsen agrees with that proposition, it argues that the Johnsons' counterclaim here was not a compulsory one. Specifically, Allen, Knudsen asserts that its original action to recover fees was based on an agreement in which the Johnsons promised to pay for services rendered at an hourly rate. Allen, Knudsen contends that the Johnsons' counterclaim for malpractice and negligence does not relate to that agreement—thus, it cannot be deemed compulsory.

[1] **[2]** A counterclaim is considered compulsory if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." Fla.R.Civ.P. 1.170. Since the Johnsons' counterclaim was based on the same representation for which Allen, Knudsen sought to recover fees, we must find that it arose out of the same transaction or occurrence as Allen, Knudsen's original action. The Johnsons' counterclaim was, therefore, a compulsory one. We must also find that since statutes of limitation do not apply to compulsory counterclaims pursuant to *Allie v. Ionata,* 503 So.2d 1237, 1240 (Fla.1987), Allen, Knudsen's argument that *Allie* is inapplicable to the instant case has no merit.

The Johnsons also contend that, despite Allen, Knudsen's argument to the contrary, ***509** Allen, Knudsen's voluntary dismissal of its original cause does not extinguish their right to now appeal the earlier dismissal of their counterclaim.

Allen, Knudsen, of course, contends that since the Johnsons' counterclaim was dismissed with prejudice before Allen, Knudsen voluntarily dismissed its case, there was effectively no counterclaim pending at the time of the voluntary dismissal. It is, thus, Allen, Knudsen's position that the counterclaim cannot now be resurrected for purposes of this appeal.

[3] **[4]** The dismissal of a compulsory counterclaim with prejudice is not considered a final disposition and is, thus, not appealable until a final disposition of the original cause has obtained on the merits. *S.L.T. Warehouse Co. v. Webb,* 304 So.2d 97 (Fla.1974); *Taussig v. Insurance Company of North America,* 301 So.2d 21 (Fla. 2d DCA 1974); *Mermel v. Rifkin,* 603 So.2d 595 (Fla. 3d DCA 1992); *Del Castillo v. Ralor Pharmacy, Inc.,* 512 So.2d 315 (Fla. 3d DCA 1987); *Sarasota Cloth Fabric & Foam, Inc. v. Benes,* 482 So.2d 574 (Fla. 5th DCA 1986). *See also Johnson v. Allen, Knudsen,* 566 So.2d 327 (Fla. 2d DCA 1990) (*Johnson II*). Further, "if a counterclaim has been served by a defendant prior to service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court." Fla.R.Civ.P. 1.420(a)(2).

Since the Johnsons' counterclaim was dismissed with prejudice, the Johnsons were unable to seek review of the dismissal thereof until a final disposition of Allen, Knudsen's original cause. For that reason, the Johnsons' counterclaim must now be considered to be pending, as any remedy from the dismissal thereof with prejudice survived a final adjudication on the merits of the original complaint. To allow a voluntary dismissal of the original cause to otherwise cut off the Johnsons' rights under the counterclaim would be a clear violation of rule 1.420(a)(2). *See Johns v. Puca,* 143 So.2d 568 (Fla. 2d DCA 1962).

Since the issues addressed herein are dispositive of the case, we do not address the remaining issues raised in this appeal.

Accordingly, the trial court's entry of summary judgment in favor of Allen, Knudsen is hereby reversed and the cause remanded with directions consistent with this opinion.

SCHOONOVER, A.C.J., and HALL and PATTERSON, JJ., concur.

All Citations

621 So.2d 507, 18 Fla. L. Weekly D1555

Footnotes

1 The record reflects that the counterclaim in *Johnson III* was dismissed with prejudice.

2 This was a voluntary dismissal to which the Johnson's had objected.

RULE 4-5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating The Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient, preferably in writing, that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

Comment

For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. A broad range of economic and other interests of clients may be served by lawyers participating in the delivery of these services. In recent years, however, there has been significant debate about the role the rules of professional conduct should play in regulating the degree and manner in which a lawyer participates in the delivery of nonlegal services. The

ABA, for example, adopted, repealed, and then adopted a different version of ABA Model Rule 5.7. In the course of this debate, several ABA sections offered competing versions of ABA Model Rule 5.7.

One approach to the issue of nonlegal services is to try to substantively limit the type of nonlegal services a lawyer may provide to a recipient or the manner in which the services are provided. A competing approach does not try to substantively limit the lawyer's provision of nonlegal services, but instead attempts to clarify the conduct to which the Rules Regulating The Florida Bar apply and to avoid misunderstanding on the part of the recipient of the nonlegal services. This rule adopts the latter approach.

The potential for misunderstanding

Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is acute especially when the lawyer renders both types of services with respect to the same matter.

Providing nonlegal services that are not distinct from legal services

Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship applies is likely to be unavoidable. Therefore, this rule requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules Regulating The Florida Bar.

In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required elsewhere in these Rules Regulating

The Florida Bar, that of nonlawyer employees comply in all respects with the Rules Regulating The Florida Bar. When a lawyer is obliged to accord the recipients of such nonlegal services the protection of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules Regulating The Florida Bar addressing conflict of interest and to scrupulously adhere to the requirements of the rule relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with the Rules Regulating The Florida Bar dealing with advertising and solicitation.

Subdivision (a) of this rule applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding misunderstanding when a lawyer directly provides nonlegal services that are distinct from legal services

Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer providing the nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by other provisions of this rule.

Avoiding misunderstanding when a lawyer is indirectly involved in the provision of nonlegal services

Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party, or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-

lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by another provision of this rule.

Avoiding the application of subdivisions (b) and (c)

Subdivisions (b) and (c) specify that the Rules Regulating The Florida Bar apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules Regulating The Florida Bar nor subdivisions (b) or (c) will apply, however, if pursuant to subdivision (d), the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, this rule is analogous to the rule regarding respect for rights of third persons.

In taking the reasonable measures referred to in subdivision (d), the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in writing.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of nonlegal services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

The relationship between this rule and other Rules Regulating The Florida Bar

Even before this rule was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules Regulating The Florida Bar that apply generally. For example, another provision of the Rules Regulating The Florida Bar

makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with the rule regulating business transactions with a client. Nothing in this rule (Responsibilities Regarding Nonlegal Services) is intended to suspend the effect of any otherwise applicable Rules Regulating The Florida Bar, such as the rules on personal conflicts of interest, on business transactions with clients, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In addition to the Rules Regulating The Florida Bar, principles of law external to the rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.

Added effective April 25, 2002 (820 So.2d 210).

Factsheet: **Stress**

We can all get stressed at times. We all react differently to pressure and not all stress is bad – it can be motivating. However, serious and prolonged stress can be very upsetting and cause serious physical and mental health concerns

Stress is by far the most common reason for calls to the LawCare helpline. Many working or studying in the legal sector have a driven, perfectionist personality that makes them more prone to stress. They often work long hours in pressurised situations, and believe they should always be in control. Feeling unable to cope with work can be particularly difficult.

"After talking through my worries with LawCare, the burden lifted. They sent me practical advice and offered the support of a LawCare peer supporter. Ann called the next day and I really felt she was there for me. I had the one-to-one support I craved and was able to talk to her about what I might do to resolve my problems."

Symptoms of stress

SLEEP DEPRIVATION: This is a vicious circle: worries about work lead to lack of sleep and lack of sleep makes it difficult to perform well at work.

PHYSICAL CHANGES: Headaches, skin complaints, frequent colds, aching muscles and digestive problems are often indicators of stress.

DRINKING AND SMOKING: Many lawyers turn to drinking and smoking to escape from the pressures of everyday life. However, alcohol is a depressant and smoking creates a new stress: the craving for a cigarette.

EATING: You may find yourself comfort eating or skipping meals.

MOOD SWINGS: You may become irritated and frustrated, get very angry one minute and feel fine the next. Other people may complain that you are short-tempered, selfish and difficult.

PANIC ATTACKS: These can happen suddenly, for no clear reason. You may feel sick, short of breath, shake, sweat and experience a sense of unreality, as if you're detached from the world around you.

Managing stress

It is important to take steps to control stress before it overwhelms you. There may be little you can do to change external pressures, but you can learn how to deal with them. it is better for your health and career to deal with the situation and change things than to struggle on. You are not alone – support is available.

What's causing your stress? The first stage in managing stress is to identify the source so that you can plan a strategy to tackle it. Common issues identified by our callers include:

- Job insecurity and lack of status
- Impossible targets
- Unsupportive colleagues/manager or having no friends at work
- Long, antisocial or inflexible hours
- Lack of support or supervision
- Overwhelming responsibilities or difficulties at home

Stress diary Keeping a stress diary over two or three weeks may help you to identify why you are stressed. When you feel that you're not coping, write down how you're feeling, including any physical symptoms. Note what you're doing and have just been doing. You can then start looking for clues to your stress. As you work through the diary, you may realise that something that appeared insignificant at the time could be a major stress trigger and you need to make changes.

Talk about it Don't stay silent. Legal professionals, in particular, may feel it's a sign of weakness to admit they aren't coping, but it's better to address problems early, before they get out of control.

Talk informally to a trusted colleague or your supervisor if you feel they might be helpful. Refer to your diary notes of triggers for stress or aspects of work you are finding overwhelming. Many callers find it difficult to tell their employers or chambers that they are stressed, fearing they will be unsympathetic. But when the stress escalates and perhaps becomes a problem, many partners, colleagues and supervisors say they had been unaware of the situation and would have offered support if they had known. Make sure they know.

If the stress is largely a response to your work being criticised, make a list of those criticisms and ask for a meeting with your supervisor to clarify what you are doing wrong and how you can improve. Analyse their responses. Are the criticisms justified or unfair? If justified, work out how to address the issue and request support and training if appropriate.

Tips

- Try to be objective: ask yourself why you are letting things annoy you
- Talk to someone you trust
- Prioritise: don't over commit; learn to say "no" or "I can't do that until next week unless I drop something else"
- Use your full holiday entitlement at work; or book time off from chambers, take a lunch break and short breaks during the day
- Do one thing at a time; break complex tasks down into manageable chunks
- Eat healthily, exercise, avoid alcohol and smoking
- Panic attacks: try to keep calm, slow your breathing, wait for it to pass
- Think through your options: should you change job within the legal profession or consider a different career entirely?

Crisis control

When you feel the stress building, stop, breathe deeply and slowly, and work through this list:

- What is the worst thing that could happen if I didn't do this?
- Will this still matter next month?
- Would I feel better about this if I broke it down into smaller sections and tackled it a piece at a time?
- Must this be done now, or can I delay it until I am feeling better about it?
- Can I pass this on to someone else?
- Am I trying to do too many things at once?
- Would talking to someone about this make me feel better?
- Do I need a holiday/good night's sleep before I tackle this?
- Don't procrastinate – the more you worry about it, the more time you have lost

Treatment for stress

Many people find counselling and **CBT** (cognitive behaviour therapy) helps with stress. **Mindfulness** can also help calm the mind. Check out the **Headspace** website **www.headspace.com** or app for more information.

Factsheet: **Depression**

Depression is an illness, just as heart disease or diabetes are illnesses, and it is an illness that affects the entire body, not just the mind. One in five people will experience depression at some time in their life, and it's a major cause of alcohol and drug dependency. However, it can be successfully treated in the vast majority of cases. Depression is sometimes triggered by traumatic events or prolonged stress, but can happen to anyone and for no apparent reason.

Symptoms

Depression is characterised by lethargy, anxiety, despair, desperation, poor sleep, lack of motivation, loss of interest in things previously enjoyed, inability to concentrate and, in extreme cases, suicidal thoughts. If you are experiencing any of these symptoms seek help from your GP.

Treatment for Depression

Counselling

Counselling has been shown to be very effective in treating depression. Depression counselling should be future-orientated, time-limited and solution-focussed. Counselling is available on the NHS, although there may be a waiting list. Private counsellors can be found through groups such as the British Association for Counselling **www.bacp.co.uk** and Psychotherapy or United Kingdon Council for Psychotherapy (UKCP) **www.psychotherapy.org.uk**

Anti-Depressants

The most effective treatment is shown to be competently prescribed and monitored anti-depressant medication, coupled with regular counselling sessions.

All anti-depressants take between two and six weeks to show any effects. Often the first symptom to be diminished is insomnia, with elevation in mood taking several months to be established. It is important to be aware of any possible side-effects before you begin taking medication. Speak to your GP for more information about anti-depressants.

Alternative Treatment

For mild depression other treatments are recommended, and for those who prefer not to take medication these may help:

Exercise

Exercise raises mood as well as increasing fitness, and provides an outlet for negative feelings. Studies have shown that exercising outdoors in a green space is more beneficial than exercising indoors. Fresh air, sunlight and greenery have all been shown to raise mood, so enjoy your garden, local park or the countryside as much as possible.

Alternative Therapy

Alternative therapies such as reflexology homeopathy and herbal remedies may help too.

People and pets

Surround yourself with supportive people who like you. Pets can also be very helpful in providing company and reassurance.

Treatment for Depression

Relax

Depression is often related to stress, and learning to relax can be key in both overcoming the illness and preventing it recurring in future. From massage to taking up a new hobby to decluttering your life, anything which makes you feel relaxed could be beneficial.

Avoid Alcohol and Drugs

There is a tendency for some people with depression to drink more, in the belief that alcohol will help to relax them. However it is unwise to drink alcohol if you have depression, since alcohol is a depressant and will worsen your symptoms in the long term. It may also be contraindicated with your antidepressants - consuming alcohol may render medication less effective Other harmful substances should also be avoided.

Self-Help Books

There are hundreds of books available which claim to help you manage depression yourself; for example, by teaching you to challenge your negative thoughts, forgive yourself or let go of the need to be perfect. These are complementary to other types of therapy, but can be helpful.

LawCare
Supporting the Legal Community

Factsheet: **Worried about a Colleague?**

If you are working with someone who appears to be struggling, is frequently anxious, short-tempered or low and may be depressed, please get in touch with LawCare, we can help.

How do I know there's a problem?

Out-of-character behaviour may include:

- **Irritability, mood swings, anger and short temper**
- **Lack of energy, concentration and motivation**
- **Frequent bouts of illness**
- **Failure to achieve targets despite apparent commitment and long hours**
- **Overconfidence despite making mistakes**
- **Withdrawal from normal social interaction**
- **Deteriorating relationships with managers and/or colleagues**
- **Neglect of personal dress and hygiene**
- **Coming into the workplace smelling of alcohol**
- **Over-reacting when challenged**

Consider asking your colleague in private what is wrong and how you might help. Suggest they discuss the situation with a trusted colleague in chambers or in the office, with HR or with an understanding supervisor and encourage them to phone LawCare's confidential helpline.

Possible causes

There could be many reasons for your colleague's behaviour, including:

Depression

Many people will experience depression at some point in their lives. It is not a character flaw, self-indulgent or a sign of a weak personality. Depression affects the entire body, not just the mind, and it can affect any one of us, all ages and genders, all ethnic backgrounds and economic groups. Many people will try to hide their depression from employers, managers and colleagues. Early treatment means less time lost at work, increased productivity and the avoidance of costly consequences both for the individual and the profession.

If you believe a colleague is showing signs of depression, encourage them to see their GP immediately. With effective medication and counselling, most people will recover. Most organisations will be willing to support a colleague receiving treatment for depression through their recovery, and will make reasonable adjustments to make their return to work as comfortable as possible.

Stress

Colleagues under stress can be short-tempered and will often not be doing their best work despite putting in long hours. A review of their workload can help, ideally with supervisors or senior staff, to ensure the colleague is not being expected to take on more work than is feasible, or take on work for which they have not been adequately trained or are not being adequately supervised. Staffing levels and holiday cover availability should also be addressed.

Different people have different tolerance for stress, and respond to stress in different ways. One person's motivating pressure can be another person's intolerable stress. It doesn't mean that anyone is stronger or weaker than anyone else, but people are entitled to work in an environment which does not put their mental health at risk. Encouraging your colleague to take a lunch break or a holiday can help, and to talk to someone when they feel things are getting on top of them.

Bullying

At LawCare we hear from many legal professionals who tell us their mental health is being affected by a colleague who is making life unpleasant for them. Bullying takes many forms, from deliberately overloading someone with work to withholding information, constant criticism, or belittling the person in front of colleagues.
It can be overt or covert.

Firms and chambers can also be guilty of this behaviour. Employers who treat their staff badly – failing to provide them with training, equipment and support, or demanding that they do work for which they are not qualified or experienced – are, in effect, bullying them. Denying rights such as sick leave and holiday, or not having systems in place whereby individuals can safely air their grievances, can cause feelings of frustration and distress and may make some people ill, mentally or physically.

If you believe that bullying is a factor in your colleague's distress, encourage them to phone LawCare's helpline.

Addiction

Denial is common to many addicts, and getting the individual to admit they have a problem can be difficult. However, their legal career depends on their recovery and, with persuasion, many addicts will reach a point where they decide to access professional support.

One of the most successful programmes for alcoholism is the 12-step method employed by Alcoholics Anonymous and other organisations. AA is free and there are meetings all over the UK and Ireland. Other 12-step groups include Narcotics Anonymous and Gamblers Anonymous.

In-patient treatment and regular follow-up is very effective for addiction, but there are considerable costs involved. Some organisations may pay for rehabilitation, and certain types of private medical insurance cover treatment for alcoholism.

How to talk to a colleague about mental health

Talking about mental health at work can be difficult. Some may find it helps to be open, and feel relieved that things are not hidden any more, but they may also experience negative reactions. It's important for people to remember they're not alone, and that many people in work have mental health problems. It's the individual's choice to talk about their mental health with colleagues or employers, there are no set rules, but talking may help to get the practical support needed to stay healthy at work.

It is also not necessary to be an expert in mental health to talk to a colleague who may be experiencing an issue. People may feel anxious about starting the conversation, but it's important to remember that talking could make all the difference to a colleague's mental health.

The conversation could be started with a simple 'How are you?' Offering to make the person a cup of tea, inviting them somewhere private for a chat, or suggesting popping out to a nearby café or for a walk, can all get people talking. Setting aside enough time to talk and switching the phone off are also good things to do in this situation.

There are some useful tips on how to start that conversation from **Mental Health First Aid England** [MHFA]. The tips are:

Keep the discussion positive and supportive – explore the issues and how to help

Be mindful of body language – make sure it's open and non-confrontational

Be empathetic and take them seriously

Don't be tempted to say things like 'pull yourself together'

Ask questions such as 'How are you feeling at the moment?', 'How long have you been feeling like this?', 'Is there anyone you feel you can ask for support?', 'Are there any work issues that are contributing to how you are feeling?', and 'Is there anything I can do to help?'

Listen carefully, don't interrupt, and try to be non-judgmental

Be reassuring and signpost them to support such as LawCare, HR, another colleague, or suggest they visit their GP

NALA | THE PARALEGAL ASSOCIATION

CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the NALA online portal. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at https://www.nala.org/certification/certtest2view. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Length In Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0 Ethics	Legal Malpractice & Real Property Transactions / Robert Rohan	*Robert Rohan*

Name of CP (Please Print)				NALA Account Number (On Mailing Label)
				149113
Signature of CP				Name of Seminar/Program Sponsor
				Legal Malpractice & Real Property Transactions / ATFS, LLC
Address				Authorized Signature of Sponsor Representative
				Robert Rohan
				Date of Educational Event:
City:		State (XX):		
Preferred e-mail address				Location:
				Recorded Webinar

For Office Use Only	
Substantive hours	
Non-substantive hours	
Ethics	

FL BAR Reference Number: 2410155N

Title: Legal Malpractice & Real Property Transactions

Level: Intermediate

Approval Period: 11/01/2024 - 05/31/2026

CLE Credits

General 1.0

Ethics 1.0

Certification Credits

Real Estate 1.0