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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001521-MR

VILLAGE CAMPGROUND, INC. AND
MAYNARD FERNANDEZ APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 10-CI-001786

MIDDLETON & REUTLINGER, P.S.C. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Village Campground, Inc. and Maynard Fernandez (collectively "Village") appeal from an order entered by the Jefferson Circuit Court on June 29, 2010, dismissing its legal malpractice complaint against Middleton & Reutlinger, P.S.C. ("M&R"). Village alleged the firm failed to timely itemize a punitive damages claim and file a slander of title claim in a mortgage dispute.

Village also appeals from an order denying its motion to alter, amend, or vacate the order entered on June 29, 2010. Having reviewed the record, the law and the briefs, we affirm.

THE UNDERLYING ACTION

M&R represented Village in a mortgage dispute against Liberty Bank ("Liberty") and others. The trial court granted a partial summary judgment against Village upon finding a claim under KRS[1] 382.365[2] was filed after the statute of limitations had expired. Summary judgment was also granted on claims for slander of title and abuse of process. Ultimately, a charge of fraud was tried by a jury. Liberty's motion for a directed verdict on Village's claim for punitive damages was granted because Village had not itemized its damages 45 days before trial as required by a pretrial order.[3] Jurors found Liberty and another party, Mortgage Express, Inc. ("MEI"), had committed fraud based on Liberty's sale of a note, proceeds, and mortgages to MEI. While jury instructions were being finalized, Village settled with MEI. Village recovered compensatory damages from Liberty. Appeal to this Court followed.

The record of the underlying action is not before us, but the procedural history and outcome are recited in *Village Campground, Inc. v. Liberty*

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[1] Kentucky Revised Statutes.

[2] Timely release of a mortgage is required once it has been paid.

[3] Itemization of damages is also required by *Fratzke v. Murphy,* 12 S.W.3d 269 (Ky. 2000). Village waited until the last day of trial to move to supplement its interrogatory responses with a specific amount for its punitive damages claims against the defendants. An order entered by the court nearly one year before trial required itemization of damages at least 45 days prior to trial.

Bank, 2008 WL 4998478 (Ky. App., November 26, 2008). Village raised two issues: (1) was summary judgment erroneously granted on its failure to release claim; and (2) did the trial court erroneously reject filing of its supplemental notice of punitive damages? Liberty cross-appealed, arguing summary judgment should have been granted on the fraud claim. This Court affirmed the grant of summary judgment on the failure to release claim because Liberty no longer held the mortgage, having validly assigned it to MEI, and therefore had no authority or responsibility to release it. We also determined the trial court's denial of Village's motion to supplement its interrogatory responses to specify an upper limit on the punitive damages instruction was not arbitrary because the motion was not filed until the end of trial, despite entry of an order requiring that damages be itemized 45 days prior to trial. Finally, we concluded Liberty's assertion that summary judgment should have been granted on the fraud claim was not reviewable on appeal.

THE MALPRACTICE ACTION

On March 16, 2010, Village filed a legal malpractice action against M&R alleging breach of contract and negligence. Village sought compensatory damages and alleged M&R provided negligent legal representation in failing to timely assert the punitive damages claim and the slander of title claim. In response, M&R moved the trial court, pursuant to CR[4] 12.02, to dismiss the

[4] Kentucky Rules of Civil Procedure.

complaint for failure to state a claim because Kentucky does not allow recovery of lost punitive damages in a legal malpractice action.

On June 29, 2010, the trial court dismissed Village's claims and opined that "punitive damages are not available as compensatory damages in a legal malpractice case." The trial court further found the slander of title claim was lost not because of M&R's negligence, but because any slander of title was perpetrated by MEI, not Liberty. The trial court concluded that such was the law of the case, and dismissed Village's claim that M&R had committed legal malpractice in its handling of the slander of title claim. Village's motion to alter, amend, or vacate the order of dismissal was denied by the trial court on August 6, 2010. This appeal followed.

ANALYSIS

When considering a motion to dismiss under CR 12.02, all pleadings are to be liberally construed in a light most favorable to the plaintiff and all allegations in the complaint are to be deemed true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987). A motion to dismiss for failure to state a claim upon which relief can be granted should be granted only when "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *James v. Wilson*, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (citation omitted). Therefore, the trial court's decision is one of law, not fact. *Id.* We review questions of law *de novo*. *See, e.g., Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Village argues the trial court committed multiple errors in granting M&R's motion to dismiss, including: not considering the allegations in the light most favorable to Village; failing to allow Village to engage in discovery before deciding the case; concluding lost punitive damages are unavailable as a matter of law in a legal malpractice action; and failing to convert the motion to dismiss into a CR 56 motion for summary judgment. Our resolution of the case turns on two of these issues.

RECOVERY OF PUNITIVES IN LEGAL MALPRACTICE ACTION

> A plaintiff in a legal malpractice case has the burden of proving "1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client." Based on these factors, a legal malpractice case is a "suit within a suit." To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful.

Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003) (internal citations omitted).

Punitive

damages are not awarded for breach of contract. KRS 411.184(4). *See also* REST 2d TORTS § 908, Comment b ("Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence. And they are not permitted merely for a breach of contract.").

Punitive damages are recoverable "only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.184(2). Village alleged M&R breached its contract and was negligent, not that it acted with oppression, fraud, or malice. Village sought to hold M&R financially responsible for the punitive damages it may have been awarded against Liberty.

Our Supreme Court has recently decided lost punitive damages from an underlying cause of action are not recoverable from an attorney in a legal malpractice suit. *Osborne v. Keeney,* __ S.W.3d __, 2012 WL 6634129 (Ky. 2012; discretionary review denied June 20, 2013). As explained in the opinion, the purpose of compensatory injuries is to make the injured plaintiff whole to the extent money can achieve such a goal. *Kentucky Central Insurance Co. v. Schneider*, 15 S.W.3d 373, 374 (Ky. 2000). In contrast, punitive damages are those, "other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." KRS 411.184(1)(f). Stated otherwise, punitive damages "are not intended to compensate a victim for his or her loss, but are designed to punish or deter a person, and others, from committing such acts in the future." *Burgess v. Taylor,* 44 S.W.3d 806, 814 (Ky. App. 2001).

Thus, punitive damages have a separate, distinct purpose from compensatory damages. Furthermore,

> the plain language of KRS 411.184 prohibits the recovery of lost punitive damages by a legal-malpractice plaintiff. KRS 411.184(2) allows: "[a] plaintiff [to] recover punitive damages only upon proving[ ] . . . that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud[,] or malice.

Osborne, at *11. Therefore, to allow Village to prove in the "suit within a suit" that Liberty should be punished for acting with oppression, fraud, or malice, but to require M&R to pay the bill, would shift the objective of punishment and deterrence away from Liberty, the real wrongdoer, and onto M&R—a third party—which would frustrate the original intent of punitive damages. Such a shift is prohibited.

In its analysis, the Supreme Court went on to say that while KRS 411.165, the statute governing liability of attorneys for legal malpractice, makes an attorney "liable to the client for all damages and costs sustained by reason thereof," those words must be harmonized with KRS 411.184 so as to give both statutes effect. KRS 411.184, prohibiting recovery against someone other than the wrongdoer, controls because it is more specific and it was enacted more than a dozen years after KRS 411.165. Therefore, the plaintiff in a legal malpractice action may not recover punitive damages from his or her attorney based on the original wrongdoer's conduct. However, a plaintiff may seek punitive damages from its attorney for its "*own* conduct" upon showing the attorney "was grossly negligent in handling the case and acted with oppression, fraud, or malice."

Osborne, at *13. Thus, the trial court correctly predicted how this question would be answered by our Supreme Court and we affirm.

Finally, we consider Village's assertion that M&R failed to timely file the slander of title claim against Liberty, which deprived Village of additional compensatory damages. Village claims it asked M&R to file the claim in September of 2002, February of 2003, and again in May of 2003, before it was finally filed in December of 2004. The trial court disposed of this claim with these words:

> [a]lthough the Court of Appeals opinion[[5]] does not directly address the grounds for this judgment, it appears to be based upon the fact that Liberty was not the holder of the mortgage at the time the release was requested. The mortgage had already been assigned to MEI and therefore, it was not within Liberty's power to release it. Thus, it appears that any slander of title was perpetrated by MEI rather than Liberty. However, [Village] reached a settlement with MEI prior to the instruction of the jury. Therefore, it appears that the loss of that claim was not due to the negligence of [Liberty]. This holding is the law of the case and it is not within this Court's authority to disturb it and the matter is appropriate for summary disposition.

The trial court is correct. The soundness of the grant of summary judgment on the slander of title claim was not directly addressed in our prior opinion—because it was not raised as error. Thus, whether wrong or right, it became the law of the case and we are without authority to change it now. *Ray v. Ashland Oil, Inc.*, 389

[5] This court made three references to the slander of title allegation, twice while characterizing Village's claim, *Village Campground,* at *5 and *6, and once in stating the claim was resolved via summary judgment. *Village Campground,* at *7.

S.W.3d 140, 149 (Ky. App. 2012); *Brooks v. Lexington–Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007) (citing *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)) ("The law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.' ").

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bryan M. Cassis
Louisville, Kentucky

BRIEF FOR APPELLEE:

John W. Phillips
William P. Swain
Katherine K. Tipton
Louisville, Kentucky