

NOT DESIGNATED FOR PUBLICATION

ANGELA PARKER AND	*	NO. 2015-CA-1106
VICKI DAIGREPONT		
	*	
VERSUS		COURT OF APPEAL
	*	
DAVID A. CAPASSO, AND		FOURTH CIRCUIT
THE LAW OFFICE OF	*	
CAPASSO & ASSOCIATES		STATE OF LOUISIANA

* * * * *

APPEAL FROM
 CIVIL DISTRICT COURT, ORLEANS PARISH
 NO. 2012-10738, DIVISION "M"
 Honorable Paulette R. Irons, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome)

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REVERSED AND REMANDED

JUNE 22, 2016

In this legal malpractice action, defendants-appellants, David A. Capasso and the Law Office of Capasso & Associates, appeal from the district court's judgment in favor of plaintiff, Vicki Daigrepoint, in the amount of \$75,525.00 in damages. For the following reasons, we hereby reverse the judgment and remand the matter to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

On November 16, 2012, plaintiffs, Angela Parker and Vicki Daigrepoint, filed a petition for damages for legal malpractice against defendants, David A. Capasso and the Law Office of Capasso & Associates. Specifically, the petition for legal malpractice alleges, in pertinent part:

II.

Defendants David A. Capasso and The Law Office of Capasso & Associates, LLC were retained to represent Plaintiffs in a matter that came to be entitled 'Vicky Daigrepoint, et al. versus Churchill Downs Corporation d/b/a/ Churchill Downs Incorporated, et al.' United States District Court for the Eastern District of Louisianan...which was filed on September 9, 2010.

III.

On February 14, 2012, the underlying defendants, Churchill Downs, et al, filed motions for summary judgment as to all five plaintiffs in the underlying case. The Defendants in the present matter, David Capasso and The Law Office of Capasso & Associates did not oppose any of the five motions for summary judgment, yet filed a Motion to Continue on February 23, 2012.

IV.

During the course of said litigation, Defendants, David A. Capasso and The Law Office of Capasso & Associates, failed to timely oppose a motion to dismiss, failed to timely respond to requests for written discovery, failed to file witness and exhibit lists as the Court's Scheduling Order required, failed to aid defense counsel in preparing a pretrial order or to prepare Plaintiffs' proposed pretrial order as the Scheduling Order required, failed to oppose five motions for summary judgment and instead filed a request to continue a hearing on the motions after the filing deadline for the oppositions had already passed, failed to timely oppose the same five motions for summary judgment after being granted an extension of time in which to oppose the motions, and failed to request a second extension of time from the Court before missing the deadline to oppose the motions for summary judgment for the second time.

On July 14, 2014, defendants filed an answer admitting the allegations stated in the petition. Subsequently, defendants stipulated to liability, and a trial on damages was held on December 11, 2014.

At trial, plaintiff, Vicki Daigrepoint, testified that Mr. Capasso's conduct was the reason her federal lawsuit to obtain loss of income, damages for emotional distress, and attorney's fees was dismissed. Ms. Daigrepoint testified that she was hired at Jefferson Downs on April 1, 1980, and that she worked continuously as a clerk/video poker cashier until she was fired on November 24, 2009. Ms. Daigrepoint testified that as a result of losing her job of thirty years, she was "very

depressed” and “[v]ery embarrassed.” As evidence of Ms. Daigrepoint’s loss of earnings for being fired, she introduced her 2009, 2010, 2011, 2012, and 2013 Federal tax returns.

After Ms. Daigrepoint testified, plaintiffs’ counsel notified the court that he had been recently notified [within two days of trial] that plaintiff, Angela Parker, was ill and unable to make the hearing. As such, plaintiffs’ counsel requested that the district court sever Ms. Parker’s claim. At that time, defendants’ counsel stated that he “was actually expecting to call the other plaintiff [Ms. Parker] to contradict the testimony of the instant plaintiff [Ms. Daigrepoint].” Nonetheless, the district judge granted plaintiff counsels request for a severance.

A judgment was rendered on April 9, 2015, whereby the district court awarded \$75,525.00 in damages “in favor of plaintiffs, Angela Parker and Vicki Daigrepoint, and against the defendants, David A. Capasso and the Law Office of Capasso and Associates.” The judgment also awarded plaintiffs’ attorney’s fees in the amount of \$24,923.00.

On April 20, 2015, plaintiffs, Ms. Parker and Ms. Daigrepoint, filed a motion to correct judgment and/or new trial alleging that “[s]aid Judgment is in favor of both plaintiffs, but should only be in favor of plaintiff, Vicki Daigrepoint, since the Angela Parker matter was stayed by the Court on December 11, 2014, because of Angela Parker’s illness.” On April 27, 2015, the district court issued the following order: “IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be rendered herein in favor of plaintiff, Vicki Daigrepoint, and against the

defendants, David A. Capasso and the Law Office of Capasso & Associates, in the sum of SEVENTY-FIVE THOUSAND, FIVE HUNDRED, AND TWENTY FIVE (\$75,525) DOLLARS.” Defendants now appeal this final judgment by asserting the following assignments of error: (1) the district court committed manifest error when it allowed trial to continue after allowing one of the plaintiffs (Ms. Parker) to suddenly and unexpectedly sever the case during trial; (2) plaintiff is not entitled to damages in lost wages from the underlying suit; and (3) plaintiff is not entitled to emotional distress damages from the underlying suit.

DISCUSSION

Defendants argue on appeal that they lost their opportunity to present a complete defense when Ms. Parker [co-plaintiff] failed to appear to testify combined with the district court’s decision to grant a sudden severance after Ms. Daigrepoint had already given testimony. In response, Ms. Daigrepoint argues that defendants could have issued a trial subpoena to Ms. Parker to ensure that her testimony would be heard, and that Ms. Parker could sever her case at any time she chose. After reviewing the applicable laws, we agree with defendants that it was legal error for the district court to grant a severance to Ms. Parker during the trial.

La. C.C.P. art. 463 allows two or more plaintiffs to be joined in the same suit, if: (1) there is a community of interest between the parties joined; (2) each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and (3) all of the actions cumulated are mutually consistent and employ the same form of procedure. *See* La. C.C.P. art. 463. Under these facts,

we find that Ms. Parker and Ms. Daigrepoint were properly joined as plaintiffs.

Further, La. C.C.P. art. 465 allows separate trials of cumulated actions and states as follows:

When the court is of the opinion that it would simplify the proceedings, would permit a more orderly disposition of the case, or would otherwise be in the interest of justice, **at any time prior to trial**, it may order a separate trial of cumulated actions, even if the cumulation is proper. (Emphasis added)

Based on La. C.C.P. art. 465, we find that the district judge erred in granting a severance to a co-plaintiff **during** the trial on the merits. We find that the proper remedy would have been to grant a continuance due to Ms. Parker's absence, or to order separate trials of the cumulated actions **prior to trial** beginning. Because of this legal error, we hereby reverse the judgment of the district court and remand this matter for a new trial. We pretermitt discussion of all remaining assignments of error.

REVERSED AND REMANDED