IN THE COURT OF APPEALS OF IOWA

No. 9-103 / 08-0900
Filed May 29, 2009

J.M. MAZZITELLI FINANCING, L.C.,
JAMES R. MAZZITELLI; RAY WILLIAMS;
RAY WILLIAMS ENTERPRISES, INC.,
Plaintiffs-Appellants,

vs.

WHITFIELD & EDDY, P.C.,
THOMAS BURKE,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Plaintiffs appeal the district court's ruling dismissing their claims against the Whitfield & Eddy law firm. **AFFIRMED.**

David L. Dutton, Waterloo, for appellant.

David L. Brown, John McClintock, and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Plaintiffs James R. Mazzitelli, J.M. Mazzitelli Financing, L.C. (JMMF), Ray Williams, and Ray Williams Enterprises, Inc. (RWE) appeal the district court's ruling dismissing their legal malpractice claims against the defendants, Whitfield & Eddy law firm (Whitfield) and attorney Thomas Burke. On appeal, plaintiffs argue that the district court erred in: (1) finding that plaintiffs failed to prove that defendants' negligence caused their damages; (2) depriving them of a trial by jury in their claim against Burke; and (3) transferring venue from Johnson to Polk County. We affirm.

I. Background Facts and Proceedings

Williams owned and operated a Domino's Pizza franchise in Iowa City and one in Coralville through his company, RWE. On June 1, 1998, RWE entered into an asset purchase agreement with Michael Cole for the Coralville store, which included such items as equipment, furniture, leasehold improvements, inventory, and supplies. Not included in this sale were accounts receivable, or franchise rights, which included trademarks, trade names, and the franchise agreement. On November 11, 1999, RWE entered into a similar agreement with Michael's wife, Stacy Cole, for the Iowa City location. Both locations were purchased for the same price, $175,000, and were financed by RWE. The Coles each signed a promissory note, as well as a security agreement granting RWE a security interest in an itemized list of tangible personal property.[1] UCC-1

[1] Both security agreements state, "Debtor hereby grants to Secured Party a continuing security interest in and to the 'Collateral' (described in Paragraph 3 below) in order to: . . . (IF APPLICABLE)(1) any Standard Franchise Agreement (stricken in Michael's agreement), (2) any lease or sublease of the 'Store Premises' . . . ."

financing statements were filed with the Secretary of State, listing the same collateral. On April 26, 2001, RWE entered into an agreement to acquire $100,000 worth of financing from JMMF in exchange for an assignment of rights to both asset purchase agreements, promissory notes, and financing statements. Additionally, Williams personally guaranteed payments of the promissory notes, should the Coles fail or refuse to perform their obligations. The assignment was recorded with the Secretary of State. In November 2002, the Coles filed a joint petition for bankruptcy relief under chapter seven of title eleven of the United States Code. Jerrold Wanek represented the Coles in their bankruptcy proceedings, and listed RWE as a secured creditor on Schedule D of the petition. Schedule C listed the equipment and inventory of the two stores as exempt property, with a value of $7500 and $6500.

During the initial meeting between the Coles and Wanek, Mazzitelli was present, as the Coles' accountant and primary creditor. Following that meeting, Mazzitelli retained Thomas Burke of the Whitfield & Eddy law firm to protect his interest in the bankruptcy proceedings. In their initial meeting, Mazzitelli provided Burke with the pertinent documents, including the assignment from RWE to JMMF. Despite this, on November 27, 2002, Burke filed a motion for relief from automatic stay on behalf of RWE, not JMMF. At a telephone hearing on this motion, Wanek stated his intention to file a motion to avoid liens and a motion to redeem assets, causing the bankruptcy judge to continue the hearing. At no time during this hearing did Burke inform the court that RWE had assigned its interest to JMMF.

On December 20, 2002, Wanek filed a motion to avoid liens and a motion to redeem property. After discovering the assignment from RWE to JMMF, he sent notice of the pending motions to both RWE and JMMF. During Burke's absence from the office, but at his request, another attorney at Whitfield filed objections to these motions, but solely in the name of RWE. No objections were filed on behalf of JMMF. A hearing on the motions was held on January 7, 2003, and for the first time, Burke requested to amend his pleadings to add JMMF as the proper creditor.

A further bankruptcy hearing was held on March 5, 2003, in order to determine the valuation of the equipment. In December 2003, the court granted the motion to redeem, finding that in failing to file a timely objection, JMMF "acceded" to the motion. The court found that the value of the property was $7500 and $6500 for the Iowa City and Coralville stores respectively, and ordered the Coles pay the value of the redeemed equipment to JMMF within forty-five days, to which the Coles subsequently complied.

In March 2005, the plaintiffs filed suit against the defendants claiming legal malpractice in the handling of the bankruptcy, which caused the plaintiffs to suffer damages. The district court found defendants were negligent in "not pursuing the necessary court action in the name of the real party in interest"; however, the court also found the plaintiffs had not proven "the defendants were otherwise negligent in their representation in the Cole bankruptcy." The court found no causation in defendants' representation to any damages sustained by the plaintiffs. Plaintiffs James R. Mazzitelli, JMMF, Ray Williams, and RWE appeal.

II. Standard of Review

Because this matter was tried at law, our review is for the correction of errors of law. Iowa R. App. P. 6.4; *State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008). The trial court's findings of fact have the effect of a special verdict, and are binding on us if supported by substantial evidence. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Beal Bank v. Siems*, 670 N.W.2d 119, 125 (Iowa 2003).

III. Negligence

Plaintiffs assert the district court erred in finding that they failed to prove that defendants' negligence caused their damages. To establish a prima facie claim of legal malpractice, the plaintiffs must produce substantial evidence that shows: (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss, or damage. *Ruden v. Jenk*, 543 N.W.2d 605, 610 (Iowa 1996). The failure to prove any one of these four elements defeats recovery for the plaintiffs. *Id.*

The district court found that Burke was negligent in failing to alert the bankruptcy court that RWE had assigned its interest to JMMF, but that plaintiffs failed to prove that this negligence was the proximate cause of their described

loss.[2] We agree. Even if negligence is established, proximate cause must be determined separately, as it does not necessarily follow negligence. *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988). The burden of proving proximate cause in a legal malpractice action is the same as any other negligence action. *Id.* To recover, the injured party must show that but for the attorney's negligence, the loss would not have occurred. *Id.* In an action based upon the negligent handling of a lawsuit, the plaintiff must prove that absent the attorney's negligence, the underlying suit would have been successful. *Id.*

Plaintiffs assert the district court failed to address their claim that defendant's negligence resulted in a "lost opportunity" to regain the franchises and continue to operate, or sell the two stores as going concerns. They claim rights to the leases and franchises follow the inventory, and had the proper creditor been identified in the bankruptcy proceedings, Williams could have stepped in to operate the stores such that the plaintiffs' investments would have been protected. We disagree. When the Coles signed the two promissory notes, RWE took a security interest in specific property, which included equipment, furniture and furnishings, leasehold improvements, food and beverage inventory, other inventory and supplies, and uniforms. Specifically excluded were the Coles's franchise agreements with Domino's. When RWE assigned the rights to

[2] Plaintiffs also assert the district court erred in not awarding them damages for attorney fees paid to defendants. *See Crookham v. Riley*, 584 N.W.2d 258, 269 (Iowa 1998) (an attorney should not be permitted to recover fees for legal services performed negligently that cause substantial damage to the client). As determined by the district court, defendants' negligence did not cause plaintiffs substantial damage, thus the district court was correct in not awarding them attorneys fees.

both asset purchase agreements and financing statements, JMMF received this same security interest. Thus, the acquired promissory notes were secured only with the above inventory assets as collateral. No franchise rights, including accounts receivable, franchise assets, trademarks, trade names, or franchise agreements, were included as a part of the secured collateral, as the bankruptcy court correctly found in its January 7, 2003 decision. While plaintiffs contend and the district court found Burke was negligent in failing to list JMMF as the secured creditor on the original motion to redeem, that failure would not have led to increasing the amount secured. The only secured interest would still have been limited to the inventory and equipment.

Even if JMMF would have been successful in objecting to the Coles' motion to redeem and been able to recover its secured property, JMMF would not have gained the ability to operate the businesses or sell the stores, as it was not entitled to any rights concerning the leases or franchises.[3] When JMMF acquired the promissory notes, Williams personally guaranteed payments of the notes, and included assurances that should the Coles default he would be able to obtain the consent of Domino's Pizza to operate the stores. While this was part of the agreement between Williams and JMMF, it was not a secured interest that was protected in any way in the bankruptcy proceedings. Williams also repeatedly informed Mazzitelli and Burke that were they able to redeem the

[3] Williams further argues that he was denied representation because defendants never contacted a bankruptcy trustee; and if one would have been contacted, the trustee would have allowed him to assume the franchise agreements and leases. The district court stated that "as has already been determined, the bankruptcy trustee was not in a position to assume those leases and operate the business. Taking over the equipment would not have necessarily resulted in 'obtaining the stores.'" We agree.

equipment, he would be able to regain possession and management of the stores. While Williams had extensive experience in the operation of Domino's franchise stores, there was no legal basis for Williams to substantiate these guarantees or retake the stores' operations within the bankruptcy proceedings.

Moreover, the plaintiffs failed to submit any proof that they would be able to acquire the leases or franchises from the Coles. The Coles entered into their leases with third parties, and no assignment of the leases from the Coles to Williams was ever recorded in Johnson County or specifically included in the security agreement. At trial, Williams could not point to any evidence that he had any interest or right in the lease to either property. Prior to the Coles purchasing the assets of the two stores from RWE, they had obtained separate franchise agreements with Domino's Pizza for the operation of the stores. In their bankruptcy petition, the Coles provided details of all assets and liabilities, including the secured interests to RWE. They specified that after exempt property was excluded, there were no assets available for unsecured creditors. The Coles further listed as their personal property two Domino's Pizza franchises, noting that they were non-transferrable and had no value. The only property in which plaintiffs had any secured interest was that property which was listed as secured: the stores' combined personal property assets, valued at $14,000. As stated by expert witness, Donald Neiman, plaintiffs are limited to what they can recover "by the collateral." JMMF was paid the value of its secured assets in the amount of $14,000. JMMF had no security in any other property and as defendants noted, plaintiffs were "grossly under-collateralized." So while Burke was negligent in failing to list JMMF on the motion to redeem, the

plaintiffs failed to prove that but for this negligence the loss they claim would not have occurred. The district court did not err in failing to address the plaintiffs' "lost opportunity" claim, as it properly noted the limitations of plaintiffs' secured interests which defendants were hired to protect.

IV. Trial by Jury

Aside from the merits of plaintiffs' appeal, they also contend some procedural error worked to their prejudice and this case should be remanded for a new trial. On March 9, 2005, plaintiffs filed a lawsuit against Whitfield in Johnson County, and the petition did not contain a jury demand. On May 26, 2006, plaintiffs filed a second petition, this time naming Burke as a defendant, and this one containing a jury demand. On June 8, 2006, plaintiffs filed a motion to consolidate the claims against Whitfield and Burke, which was granted. On December 22, 2006, in a ruling on the motion for clarification of the consolidation order, the district court found that plaintiffs waived their right to trial by jury. Plaintiffs appeal, stating that they were deprived of their right to a jury trial concerning their claim against Burke.

Iowa's rule on consolidation is modeled after federal rule forty-two. *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 419 (Iowa 1994). "Consolidation is a procedural device designed to promote judicial economy." *Id.* at 420. The district court followed the decision of *Walton* in finding that plaintiffs are not entitled to file two nearly identical petitions in order to expand their procedural rights. *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977). We agree that when plaintiffs filed their second petition against Burke, they made the same

allegations of legal malpractice as in their first petition; nothing materially changed, only the named defendant. We affirm.

V. Venue

Finally, plaintiffs argue that the court erred in allowing venue transferred from Johnson to Polk County. Specifically, they contend that venue was proper in Johnson County because it was brought in the county in which damage was sustained. Iowa Code § 616.18 (2005). "Property" under Iowa Code section 616.18 encompasses both tangible and intangible assets, and because plaintiffs' underlying personal injury action dealt with their damaged property, they assert this statute is applicable. *Johnson v. Nelson*, 275 N.W.2d 427, 430 (Iowa 1979). While the damage may have occurred in Johnson County, this statute is inapplicable because Iowa Code section 616.18 only applies when the injury or damage is sustained in a county where none of the defendants resides. *Tull v. Honda Research & Dev., Ltd.*, 469 N.W.2d 683, 686 (Iowa 1991). To the contrary, Iowa Code section 616.17 provides that personal actions must be brought in a county in which some of the defendants actually reside. We agree with the district court that defendants' place of business is in Des Moines; many triggering events and procedural aspects of the lawsuit occurred in Des Moines; and the prior bankruptcy proceedings took place in the United States Bankruptcy Court for the Southern District of Iowa, located in Polk County. These factors are sufficient to find that change of venue was proper. We have heard and considered all the issues on appeal and we affirm.

AFFIRMED.