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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000186-MR (DIRECT APPEAL)
AND
NO. 2002-CA-000187-MR (CROSS-APPEAL)

JOHN NEIL WILLIAMS
and DON WILLIAMS — APPELLANTS/CROSS-APPELLEES

APPEALS FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 99-CI-01103

THOMAS LEE OSBORNE;
THOMAS L. OSBORNE, P.S.C.
and WHITLOW, ROBERTS, HOUSTON
& STRAUB — APPELLEES/CROSS-APPELLANTS

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER, JUDGE; AND MILLER, SENIOR JUDGE.[1]

EMBERTON, CHIEF JUDGE. John Neil Williams and his father, Don Williams, commenced this action against Thomas Lee Osborne,

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Thomas L. Osborne, P.S.C., and Whitlow, Roberts, Houston & Straub alleging breach of contract, negligence, negligent misrepresentation, fraud, and breach of fiduciary duty relating to their payment of an attorney's fee to Osborne. On appeal, the Williamses allege that the trial court erred in granting a directed verdict at the close of the appellees' proof on Don's contract and negligence claims and Neil's contract claims. Although the trial court granted to appellees directed verdicts on the fraud, negligent misrepresentation, and breach of fiduciary duty claims, the Williamses do not appeal on those issues. The appellees' cross-appeal alleges various errors both in the denial of pretrial motions and during the trial.[2]

The relationship between the parties is tied to the tragic death of Bobbi Holman Williams. Neil and Bobbi had been high school sweethearts and were married in July 1984. Neil was an employee of his brother's construction company and Bobbi operated the Holman House Restaurant, a well-known restaurant in Paducah, owned by Neil, Bobbi and Bobbi's father. Some ten years into the marriage Neil became romantically involved with

[2] The Williamses also allege that the trial court erred when it excluded the expert testimony of a law professor three days prior to trial; when it erroneously excluded evidence of prior bad acts committed by Osborne; when it ordered the Williamses to give their closing before appellees; and, when it failed to award sanctions. The appellees' cross-appeal alleges that the Williamses' claims should have been disposed of by summary judgment and the trial court in the admission of evidence at trial. Since we hold that, as a matter of law, the Williamses' claims for breach of contract and negligence fail, the remaining issues raised are not discussed.

Kathy Sue Beach, and although he concealed the affair from Bobbi for over one year, she eventually discovered the relationship and Neil moved from the family residence in March 1996.

In the midst of the romantic turmoil, Neil approached Valva Buford, a friend of Kathy's, and expressed interest in having his wife killed. Valva contacted Randall Yost, a friend of her husband's, who agreed to commit the murder. Neil provided blueprints of the restaurant and Bobbi's photo. Subsequently, in addition to cash, Neil provided information to Valva concerning Bobbi's vehicle and a physical description with instructions that Valva pass the information and cash to Yost. Neil told Valva to inform Yost that he wanted the murder accomplished by February 1996. February 1996 passed, however, without the commission of the murder. On July 16, 1996, upon returning his son to the marital residence Neil found Bobbi murdered.

Yost, upon learning of Bobbi's death, contrived a scheme to blackmail Neil for his role in the murder conspiracy. Neil, fearful that Yost would implicate him in the murder, contacted authorities and told of Yost's attempted blackmail. Yost and Valva were then arrested for their part in the conspiracy. Neil, anticipating his own arrest, contacted Osborne for legal representation. Osborne, then associated with the law firm of Sheffer & Hoffman, had done work for the

Williams family in matters unrelated to Neil's criminal activity.[3]

On February 20, 1998, Neil was indicted for conspiracy to murder Bobbi and in March 1998, Neil and Osborne entered into a verbal agreement that Osborne would defend Neil in the criminal proceedings for a flat fee of $200,000. Neil's bail was set at one million dollars. Neil's father Don, having posted the bail, testified that he raised the bail money by mortgaging all his property and borrowing from Dr. Wendall Gordon, and that Osborne prepared the required documents necessary for the execution of the loans. Don also contends that to finance the interest on the loans, upon Osborne's advice, he withdrew money from his retirement plan. Also, in order to pay $150,000 of Osborne's legal fee for defending Neil, Don sold a business.

Osborne began preparing for trial accumulating a voluminous file containing information and pages of Osborne's handwritten notes. Numerous witnesses were interviewed and trial subpoenas were issued. In order to assist in the defense, Osborne brought in Roger Perry, a local lawyer.

In early October 1998, Osborne contacted Don requesting the remaining $50,000 due. Don delivered the $50,000 in a cashier's check, which identified Neil as the remitter.

[3] Osborne left the Hoffman firm and in January 1998, joined the firm of Whitlow, Roberts, Houston & Straub.

With the November 16, 1998, trial date nearing, Osborne continued to prepare, including interviewing witnesses.

During the criminal investigation, the authorities had recovered from Yost's possession the blueprint of the restaurant and the photograph of Bobbi. Recognizing that both were crucial to the Commonwealth's case against Neil, Osborne pursued the questioning of witnesses regarding the origins of the evidence. Although in earlier interviews with Neil and Kathy Beach, it was Kathy's position that she had never seen either piece of evidence before and did not know how Yost came to possess either. On November 6, 1998, she changed her version of the facts and stated that she gave the photograph to Valva. She stated that this would be her version at trial in order to aid Neil's defense. Osborne contends that faced with a witness who admitted she intended to commit perjury, ended the interview. In the ensuing days, Osborne and Perry discussed trial strategy and a possible motion against the prosecutor for misconduct after the prosecutor filed a notice of intent to offer evidence of prior bad acts committed by Neil. Apparently Neil disagreed with Osborne's position that such a motion should not be filed and the attorney-client relationship further deteriorated.

On November 11, 1998, Osborne disclosed to the presiding judge, Judge Hines, his difficulty with this client and his knowledge that a key witness intended to perjure

herself. On November 12, 1998, Osborne was permitted to withdraw from the case and Perry was named as Neil's counsel. The trial date was rescheduled for March 1, 1999. On November 13, 1998, a letter was delivered to Neil reflecting services and expenses in the amount of $193,574.32. Included in the amount due were various charges for phone calls to Dr. Gordon regarding the posting of bail and work billed for various financial documents.

Neil was tried and found guilty on the charge of conspiracy to commit murder and sentenced to twelve years' imprisonment. In an unpublished opinion, this court affirmed the conviction. The Kentucky Supreme Court denied discretionary review on December 12, 2001.

Subsequent to his conviction, Osborne, the managing partner of his firm, Neil, and Neil's brother met to discuss the amount paid to Osborne. After some negotiations, Osborne proposed a $100,000 refund of the amount paid. On December 10, 1998, Neil, in the presence of his own counsel, Dennis Null, signed a release. Osborne was not present at the signing. The release recites that in consideration for the release agreement, $100,000 would be refunded by Osborne and payable to Perry in the amount of $75,000 and Null in the amount of $25,000. It contains a final settlement clause providing that:

> This Release Agreement shall be FULL AND FINAL SETTLEMENT of any and all claims, debts, suits, actions and causes of action of whatsoever kind or nature, whether civil or administrative, whether at law, in equity or mixed, whether matured, contingent or inchoate, and whether known or unknown, that any party, now has, has had or may hereafter have against any other party, their predecessors, affiliates, successors, assigns, officers, directors, shareholders, employees, agents, representatives, and insurers, in any way, manner or degree arising from or related to the subject matter of the civil actions or the making of this agreement.

Additionally, the agreement contains a general release clause and recites that it was entered into voluntarily. With Neil's signature, the release was delivered to Osborne on December 30, 1998, and a check was drafted in the amount of $100,000 jointly payable to Perry, Null and Neil. All payees endorsed the check, stating on its face that it was a "Final Settlement of Fee."

The Williamses commenced this action against the appellees on November 8, 1999. Appellees' pretrial motion to dismiss the complaint and for summary judgment were denied and the trial was commenced on October 1, 2001. At the conclusion of the Williamses' case, the appellees moved for a directed verdict in accordance with CR[4] 50.01. Although the trial court granted directed verdicts as to the claims of fraud and

[4] Kentucky Rules of Civil Procedure.

negligent misrepresentation, it denied the motions as to Don and Neil's claims for negligence, breach of fiduciary duty and breach of contract claims. At the conclusion of the appellees' case, the Williamses offered no rebuttal evidence. The appellees again moved for entry of directed verdict and the trial court granted the motion on all claims except that of negligence brought by Neil.

The Williamses' claim that the court could not reconsider its ruling after denying the earlier motions for directed verdict. It is the general rule that a court retains power to reconsider its rulings until the final adjudication disposing of the case.[5] Similar to the denial of a motion for summary judgment, a denial of a directed verdict is interlocutory and does not dispose of the case but permits it to be decided by the trier of fact.[6] In this case, the trial court denied the motions until after the Williamses had the opportunity to rebut evidence offered by the appellees and to conduct its own independent research.

Contrary to the Williamses' argument, there is nothing in CR 50.01 limiting the power of a trial court to grant a directed verdict only at the close of the plaintiff's case. The rule simply recognizes that a party may move for a directed

[5] Jones v. Baptist Healthcare System, Inc., Ky. App., 964 S.W.2d 805 (1997).

[6] See Ford Motor Credit Co. v. Hall, Ky. App., 879 S.W.2d 487 (1994).

verdict at the close of the evidence offered by an opposing party without waiving the right to present evidence. The trial court retains the power to direct a verdict at any point in the trial where the evidence clearly and definitely discloses no cause of action.[7]

There is no dispute that an attorney-client relationship existed between Neil and Osborne. As to Don, however, the trial court found that no attorney-client relationship existed by which he could sustain his action for negligence or breach of contract. We agree with the trial court and affirm the dismissal of Don's claims.

A directed verdict is to be granted only when

> "drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict." Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 26 (1998). The trial court is required to "consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). In our review, we must "consider [ ] the evidence in the same light." Id.[8]

Neil hired Osborne to represent him in the criminal proceedings arising from the conspiracy charges. Don was not

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[7] Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770 (2000).

[8] Lambert, supra, at 775.

implicated in the criminal case, and other than his parental relationship, had no connection to the conspiracy to murder Bobbi. "An attorney-client relationship is personal in nature."[9] A legal malpractice action accrues only to the attorney's client and not to third parties.[10]

The evidence, when viewed most favorably to Don, is that Don posted a one-million-dollar bail and because Osborne failed to move to reduce the bail, Don suffered monetary loss in the form of interest charges. The fallacy in Don's contention is that any duty Osborne owed to reduce the bail was to his client, Neil. The fact that Don provided the bail money does not give rise to an attorney-client relationship.

A lack of privity, and consequently, the lack of an attorney-client relationship does not necessarily preclude a civil claim against an attorney. Although ordinarily not liable to third persons for acts committed in representing a client, if the attorney acted fraudulently or tortiously and injury results to a third person the attorney may then be liable.[11] And, in Hill v. Willmott,[12] relying on an opinion from a California

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[9] American Continental Ins. Co. v. Weber & Rose, P.S.C., Ky. App., 997 S.W.2d 12, 14 (1998).

[10] Id.

[11] See Rose v. Davis, 288 Ky. 674, 157 S.W.2d 284 (1941)(overruled on other grounds Penrod v. Penrod, Ky., 489 S.W.2d 524 (1972).

[12] Ky. App., 561 S.W.2d 331 (1978).

court, the court stated that, "[a]n attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of a lack of privity. . . ."[13] The plaintiff, however, is required to demonstrate the presence of the traditional negligence elements, a duty to the plaintiff, a breach of that duty, and resulting damages.

There is evidence in the record that Osborne prepared various legal documents to enable Don to finance the bail amount and to pay Neil's fees. However, there is no evidence that Osborne committed any negligence in preparing the documents or in advising Don as to how to finance Neil's obligations. Again, the only evidence produced at trial concerned alleged breaches of duties owed to Neil in representing him in the criminal matter.

Don's complaint that Osborne should have sought a reduction in bail and his allegations of negligence in Osborne's preparation of Neil's defense and his withdrawal from the case are all alleged breaches of duties owed only to Neil. There was no error in granting a directed verdict on Don's claims.

Neil had an attorney-client relationship with Osborne; a disputed matter in pretrial motions, however, was the effect of the release signed by Neil. The trial court denied all pretrial motions by appellees requesting judgment based on the

[13] Id. at 334. (citing Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

release. After hearing the evidence at trial, the court found there was no proof that Neil signed the release under duress and directed a verdict on the breach of contract claim.

A release, like any binding contract, must be supported by consideration.[14] There was undisputed evidence at trial that Osborne and his staff performed work on Neil's case, and Neil's new counsel acknowledged that some of the work was used at trial. Although the value of Osborne's services was disputed, the acceptance by Neil of less than the full amount paid Osborne manifested and constitutes an accord and satisfaction.[15]

Neil contends that he was coerced into signing the release for fear of not being able to pay legal fees to his new counsel. Duress sufficient to void an otherwise enforceable contract requires an "actual or threatened violation or restrain on a man's person, contrary to law, to compel him to enter a contract or discharge one."[16] In Adams v. Phillip Morris, Inc.,[17] the court explained the factors considered when reviewing a claim that a release was entered into under economic duress:

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[14] Floyd v. Christian Church Widows and Orphans Home of Kentucky, 296 Ky. 196, 176 S.W.2d 125 (1943).

[15] Brown v. Kentucky Lottery Corp., Ky. App., 891 S.W.2d 90 (1995).

[16] Boatwright v. Walker, Ky. App., 715 S.W.2d 237 (1986).

[17] 67 F.3d 580, 583 (6th Cir. 1995).

> In evaluating whether a release has been knowingly and voluntarily executed, we look to (1) plaintiff's experience, background, and education; (2) the amount of time plaintiff had to consider whether to sign the waiver, including whether . . . [there was] an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; (5) the totality of the circumstances.

Neil is obviously an experienced businessman and was represented by counsel when he signed the release. Osborne and his firm obviously did work on his case for which they were entitled to be compensated. There was consideration for the release and its purpose was to settle the parties' dispute. The fact that Neil needed the $100,000 refund to pay his new counsel is not duress.

Nor is it a defense to enforcement of the release that Neil's newly retained counsel, Null, informed him that the release is not binding. Null's erroneous opinion does not void the release and is imputable to Neil.[18]

Finally, Neil suggests that the release was not binding on Whitlow, Roberts Houston & Straub and Thomas L. Osborne, P.S.C., when only Osborne signed the release. Thomas L. Osborne, P.S.C., and Osborne were members of the law firm; the release provides that it constitutes a full and final settlement of all claims against each other and their

[18] Jones v. Cowan, Ky. App., 729 S.W.2d 188 (1987).

affiliates, successors, officers, directors, shareholders, employees, agents, representatives and insurers. A release and covenant not to sue which extinguishes the liability of the servant eliminates the vicarious liability of the master. Any vicarious liability of the firm that may have existed as result of Osborne's actions in the representation of Neil is extinguished by the release.[19]

In their cross-appeal the appellees contend that because the release is enforceable and because Neil failed to timely tender back the $100,000 consideration, the trial court erred in refusing to grant summary judgment. Neil did not tender back the consideration for the release prior to filing this action, nor in response to the appellees' motion for dismissal did he tender it back, but instead, filed an irrevocable letter of credit. An action to avoid a settlement requires that after the defendant pleads the settlement as a defense, the amount paid be tendered back.[20] Appellees' contend that the failure to tender back the consideration, in cash or check, as a matter of law, precludes Neil's claim. Even if we agree with appellees, any error committed by the trial court is harmless. Appellees were granted directed verdicts so there can

[19] Separate claims for negligent hiring/retention and negligent supervision were severed for trial purposes and are not a part of this appeal. The effect of the release on those claims is not presented.

[20] McGregor v. Mills, Ky., 280 S.W.2d 161 (1955).

be no prejudice by the failure to grant a summary judgment. Additionally, although we find that Neil's negligence claim is included in the release, the trial court submitted the issue to the jury and it found no liability.

The remaining issues raised by the parties are moot. The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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