

LOLA BENFIELD

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NO. 2003-CA-0931

VERSUS

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COURT OF APPEAL

**DAVID K. BUIE, DARRYL J.
CARIMI, THE CARIMI LAW
FIRM, AND ABC INSURANCE
COMPANY**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-17857, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

Judge Edwin A. Lombard

(Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge
Edwin A. Lombard)

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PART;
PART

AFFIRMED IN
REVERSED IN

In this legal malpractice matter, plaintiff claims damages for the alleged improper handling of her Jones Act claim associated with the disappearance and presumed death of her son.

FACTS AND PROCEDURAL HISTORY

Plaintiff/appellee, Lola Benfield (hereinafter “Benfield”), claims damages from defendants/appellants, David K. Buie (hereafter “Buie”), Darryl J. Carimi and the Carimi Law Firm for their alleged improper handling of her underlying Jones Act claim associated with the disappearance and presumed death of her son, Joseph Kelley (hereafter “Kelley”). Plaintiff’s case is based on the allegation that appellants negligently allowed her claim to prescribe. It is undisputed that her underlying claim prescribed after three years.

Kelley disappeared on or about September 30, 1993, while on board a shrimping vessel, the Mona Diane. His body was never found and no one witnessed the accident. Benfield retained an attorney named Frank Buck (hereafter “Buck”) to investigate her son’s disappearance. Buck represented

Benfield from October 1993 to April 1994. Buck filed in Orleans Parish the necessary paperwork to obtain Kelley's presumptive death certificate by drowning. In April 1994, Benfield discharged Buck and retained Buie and The Carimi Law Firm. By letter dated April 26, 1994, Buck acknowledged his discharge and wrote to Buie a four-page analysis of Benfield's case of liability, damages, and the presumptive death certificate procedural history. Buck also gave Buie the names of detectives with the U.S. Coast Guard and New Orleans Police Department, and the name of the vessel's insurance adjuster. On May 12, 1994, Buie obtained Joseph Kelley's presumptive death certificate at an unopposed hearing.

The Mona Diane was insured by Sunderland Insurance Company (hereafter "Sunderland"). On March 25, 1994, Sunderland filed a complaint for declaratory judgment in United States District Court for the Eastern District of Louisiana alleging various claims seeking a determination that no insurance coverage existed. Buie received notice that the complaint was filed and sent Buck a letter dated May 19, 1994 containing a copy of the complaint. Buck responded by letter date June 6, 1994 offering advice on how to defeat the complaint for declaratory judgment and attached to the letter a copy of a sample motion to dismiss the declaratory action. In December 1994, that declaratory judgment was granted in favor of the

insurer denying coverage with no opposition filed on behalf of the named defendants.

Buie filed suit in federal court in September 1995 and the case repeatedly came upon the federal-call-docket. On September 3, 1996, the federal court dismissed the underlying case for lack of prosecution based upon the failure to serve the petition and citation upon the defendants. Buie re-filed the federal lawsuit on September 30, 1996, the same day Benfield's underlying claim prescribed. In July 1998, Buie wrote a letter to Benfield telling her that the lawsuit was dismissed, but that it would be re-filed. Shortly after receiving the letter, appellee's daughter, Connie Cooper (hereafter "Cooper"), retrieved the entire legal file from the defendants. Benfield and Cooper returned to Buck after receiving the file and he informed them that the case had prescribed. Benfield filed her legal malpractice claim on October 18, 1998.

On December 20, 2002, the trial court ruled in favor of the plaintiff, Ms. Benfield, and against the defendants, David Buie, Darryl Carimi, the Carimi Law Firm and Westport Insurance, awarding her \$100,000 in pecuniary loss, \$50,000 in pain and suffering and \$50,000 in mental anguish, plus interest from the date of judicial demand until paid and all costs. It is from this judgment that the defendants now appeal.

Assignments of Error No. 1 and No. 2

Appellants first argue that the trial court erred in finding that defendants committed legal malpractice. To prove a claim for legal malpractice, a plaintiff must prove: (1) there was an attorney-client relationship; (2) the attorney was negligent; and, (3) that negligence caused plaintiff some loss. *Spelman v. Bizal, et al.*, 99-0723, (La.App. 4 Cir. 3/1/00) 755 So.2d 1013 quoting *Couture v. Guillory*, 97-2796 (La.App. 4 Cir. 4/15/98), 713 So.2d 528 quoting *Scott v. Thomas*, 543 So.2d 494 (La.App. 4 Cir. 1989).

It is admitted that there was an attorney-client relationship between Benfield, David Buie and the Carimi Law Firm. Appellee makes reference to a stipulation reached among all parties about the relationship allegedly between plaintiff, David Buie, Darryl Carimi and the Carimi Law Firm. The stipulation is unclear as to whether the parties meant Carimi individually or the Carimi Law Firm. The stipulation lacks the necessary certainty to reflect the parties' intentions. "[S]ince it is ambiguous, it cannot bind either party." *Davis v. Louisiana Power and Light Co.*, 00-13 (La. App. 5 Cir. 5/17/00); 762 So.2d 229, 232.

The stipulation notwithstanding, there is no evidence of an attorney-client relationship between Benfield and Darryl Carimi. Although the trial court cast Darryl Carimi in judgment, the reason for judgment is silent on

this issue. Darryl Carimi met with Benfield to tell her that her case was dismissed after Buie left the Carimi Firm; however, there is no evidence that Darryl Carimi gave her legal advice or that he wrote or signed any document related to the case. Furthermore, Appelle and her daughter testified that their involvement was limited to Buie and the Carimi Law Firm and no reference was ever made during any testimony about Darryl Carimi's acts or omissions in his alleged representation.

“In an action for legal malpractice, the plaintiff must show that the attorney in question failed to exercise the degree of care, skill and diligence which is exercised by prudent practicing attorneys in his locality. He is not required to exercise perfect judgment in every instance.” *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So.2d 239, 244 (1972). A lawyer should not neglect any legal matter entrusted to him. *La. State Bar Ass'n. v. Causey*, 393 So.2d 88, 91 (La. 1980). An attorney owes his client the duty of diligent investigation and research. *Dixon v. Perlman*, 528 So.2d 637, 642 (La. App. 2 Cir. 1988). An attorney is negligent if he accepts employment and fails to assert timely a viable claim or causes the loss of opportunity to assert a claim for recovery. *Jenkins v. St. Paul Fire and Marine Ins.* 442 So.2d 1109 (La. 1982).

It was gross error for the attorneys not to pursue Benfield's case.

Every lawyer undertaking to advise a client holds himself out as to possess certain minimum skills, knowledge and ability. When a lawyer accepts a maritime case, he must know the basic concepts of maritime law, which include a three-year prescriptive period. Appellants, failed to conduct any good-faith investigation or discovery, and allowed the client's case to prescribe. It is clear that Buie and the Carimi Law Firm neglected Benfield's claim and cost her the opportunity to assert her claim. Although the trial court erred in finding that Darryl Carimi was negligent/casting him in judgment, we find no error in the trial court's finding that Buie and the Carimi Law Firm committed legal malpractice.

Assignment of Error No. 3

Appellant's third assignment of error, that the trial court erred in failing to find that plaintiff's malpractice claims were preempted, is without merit. A plaintiff has one (1) year from the date she learned of the alleged act/omission but no later than three (3) years from its occurrence to file suit. Louisiana Revised Statute 9:5605 (West 2003). That period (one but no more than three years) is "preemptive" in nature and cannot be interrupted, suspended or renounced. *Reeder v. North*, 97-0239 (La. 10/21/97); 701 So.2d 1291.

Benfield received a letter from Buie in July 1998 informing her that

her claim was dismissed. She retrieved her entire file shortly thereafter and then filed her legal malpractice suit October 19, 1998, less than one year after discovering that her claim had prescribed. Buie argues that he sent a letter and a copy of the file to Benfield in October 1996 specifying the difficulties in locating and serving the underlying defendants, but there is no evidence that Benfield received a letter from Buie or a copy of her file in 1996. Plaintiff's suit was filed within the time period required by R.S. 9:5605 and the trial court was correct in rejecting defendant's argument.

Assignment of Error No. 4

Appellants complain that the trial court erred in finding that they failed to meet their burden in showing that plaintiff could not succeed in her underlying claim. In the underlying Jones Act case, the plaintiff has the burden of proving the vessel at issue was unseaworthy and that the unseaworthy condition played a substantial part in bringing about or actually causing the injury at issue. *Foster v. Destin Trading Corp.*, 96-0803 (La. 5/30/97); 700 So.2d 199, 209. But, when the plaintiff proves that the negligence on the part of his former attorney has caused the loss of the opportunity to assert a claim and thus establishes the inference of causation of damages resulting from the lost opportunity for recovery, the negligent attorney bears the burden of going forward with evidence to overcome the

client's prima facie case of negligence by proving that the client could not have succeeded on the original underlying claim. *Jenkins*, 422 So.2d at 1110.

The defendants assert that since no one located the underlying defendants or witnesses, and no one has been able to conclude whether or not Kelley fell overboard as a result of a broken toilet on the vessel, they have met their burden of proving Benfield's underlying case could not succeed. We cannot agree. The defendants failed to introduce a single witness or document regarding the *Mona Diane's* seaworthiness, Kelley's alleged negligence, and whether he endured any pre-death pain and suffering.

Defendants did not prove that the *Mona Diane* was seaworthy. They didn't produce the vessel itself, pictures thereof, or any testimony regarding its' condition at the time. They also produced no evidence that Joseph Kelley failed to act with due care for himself if the vessel was, in fact, not seaworthy. The standard is one of a "reasonable seaman in like circumstances." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997). A seaman cannot be charged with contributory negligence because he uses an unseaworthy part of a vessel in its defective condition if he has no choice but to use it as it is. *San Pedro Compania Armadoras, S.A. v.*

Yannacopolos, 357 F.2d 737 (5th Cir. 1966). Assuming the rumors and speculation that Kelley was forced to relieve himself in a bucket then throw it overboard, he had no choice but to utilize the vessel in its' defective condition.

Defendants presented no evidence to refute plaintiff's allegations of Kelley's pre-death pain and suffering. It was the defendants' responsibility to locate witnesses and produce evidence, not only for Benfield's claim, but for their malpractice defense as well. They simply failed to carry their burden and we find no error in the trial court's judgment.

Assignment of Error No. 5

Defendants assert that the trial court erred in awarding damages to plaintiff. There is no Louisiana jurisprudence to support the defendants' argument that the success of a malpractice action is dependent upon whether the underlying judgment was collectible, and, there was no proof that the underlying defendants had no other assets or property to satisfy the judgment.

Defendants admit that they did not probe the Sunderland Insurance policy or investigate any of the claims in the declaratory action. Interpretation of various clauses in Sunderland's policy would depend on whether the vessel's owner had engaged in a joint venture/partnership versus

a charter/lease, and, on how many people were on the vessel at the time. Defendants still could have pursued Sunderland regardless of the default. Moreover, it is highly unlikely that defendants would have accepted the underlying case if a judgment was not collectible.

In regard to the award for pecuniary loss, plaintiff is entitled to recover that which she may reasonably anticipate to accrue without proof that it will in fact be forthcoming. *Presley v. Upper Mississippi Towing Corporation*, 141 So.2d 411 (La. App. 1 Cir. 1961). Benfield testified about the amount and kind of assistance she received each month from her son, and her daughter corroborated that testimony. The judge found both witnesses to be credible and awarded compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. We find no reason to disturb that judgment.

Assignment of Error No. 6

In their final assignment of error, defendants argue that the trial court erred in granting mental and emotional distress damages in connection with the legal malpractice claim. “One who by extreme and outrageous conduct intentionally or negligently causes severe emotional distress to another is subject to liability for such damages.” *Arco Oil and Gas v. Deshazer*, 98-

1487 (La. 1/20/99), 728 So.2d 841, 845. In *White v. Monsanto Co.*, 585 So.2d 1205 (La. 1991), extreme and outrageous conduct was defined as conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Id.* at 1209.

Benfield hired Buie and the Carimi Law Firm not only to pursue her claim against the underlying defendants, but also to get answers about the disappearance and presumed death of her son. Plaintiff testified that she just wanted closure and trusted Buie was handling her case, and, once she discovered she no longer had a case, it “almost killed” her. Defendants lied to Benfield for years, assuring her that her claim was progressing when they knew full well that they had done nothing to further her case. Considering the facts of this case and the nature of the malpractice committed, to neglect, deceive and manipulate a mother who is lamenting the devastating loss of her son is conduct sufficient to warrant an award for infliction of emotional distress.

Based on the foregoing, that portion of the trial court’s ruling awarding plaintiff \$100,000.00 for pecuniary loss, \$50,000.00 for a survival action, and \$50,000.00 for infliction of emotional distress is affirmed. That portion of the judgment holding Darryl J. Carimi personally liable is

reversed.

PART;

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AFFIRMED IN

REVERSED IN