STATE OF VERMONT
RUTLAND COUNTY

RUTLAND PLYWOOD CORPORATION,	)	**Rutland Superior Court**
	)	**Docket No. 317-5-05 Rdcv**
Plaintiff,	)	
	)	
v.	)	
	)	
ANDREW MAASS and	)	
THOMAS DOWLING,	)	
	)	
Defendants	)	

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED OCTOBER 17, 2009

This matter came on before the Court on defendants Andrew Maass and Thomas Dowling's Motion for Summary Judgment, filed October 17, 2008. Plaintiff Rutland Plywood Corporation filed a Memorandum in Opposition on April 8, 2009. Defendants filed a Reply on May 6, 2009. Plaintiff filed a Statement of Undisputed and Disputed Material Facts on June 29, 2009.

Plaintiff Rutland Plywood Corporation ("RPC") is represented by Phillip H. White, Esq. Defendants Andrew Maass and Thomas Dowling are represented by John D. Monahan, Jr., Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to

judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs*, *Inc.,* 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.,* 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

In April 1998, Rutland Plywood ("RPC") terminated the employment of its employee, John Wesnefski. In October 1999, Mr. Wesnefski filed suit in federal court against RPC alleging wrongful discharge and unlawful discrimination.

RPC hired the law firm of Ryan, Smith, and Carbine, LLC ("RS&C") to defend it against Mr. Wesnefski's claims. The attorney with primary responsibility for defendant RPC was Andrew Maass, Esq. Attorney Maass took part in all pre-trial discovery, handled pre-trial communications with Mr. Wesnefski's counsel, and tried the case on RPC's behalf. RS&C, including Attorney Maass and Attorney Thomas Dowling, had represented RPC for many years prior to the handling of Mr. Wesnefski's suit. Attorney Dowling knew the financial vulnerabilities of RPC, as he had served on the Board of RPC and was an officer of RPC (secretary) during the relevant period.

As part of the federal lawsuit brought by Mr. Wesnefski, the parties engaged in an Early Neutral Evaluation ("ENE") session on April 11, 2000. Prior to the ENE, document discovery had been exchanged, depositions of Mr. Wesnefski and Michael Lannon had been completed, and the evidence offered at a prior unemployment compensation hearing was known to Attorney Maass. Attorney Maass knew that RPC had economic exposure on the wrongful termination claim. He had previously recommended that RPC not terminate Mr. Wesnefski. Attorney Maass and Attorney Dowling also knew that there was no insurance coverage for Mr. Wesnefski's claim or for the cost of defense.

In anticipation of the ENE session, Attorney Maass spoke with Jack Barrett, president of RPC, on April 10, 2000. Mr. Barrett asked Attorney Maass and Attorney Dowling to each recommend a settlement amount. Attorney Maass and Attorney Dowling each recommended $20,000 as the initial authority, a "starting number" to take into the mediation. Mr. Barrett followed that recommendation and authorized $20,000. Mr. Barrett told Attorney Maass that he would like to settle the case. He gave Attorney Maass his cell phone number and directed Attorney Maass to call him if he needed greater authority to settle.

Prior to this discussion, during the discussion, and during the ENE process itself, Attorney Maass never discussed with Mr. Barrett that the likely defense costs could run as high as $90,000 if the case went to verdict, that if the jury found for Mr. Wesnefski on the wrongful termination claim compensatory damages would be at least $40,000 on top of the defense costs, that a finding of wrongful termination could increase the likelihood of a finding of discrimination, and that if a jury returned a verdict of discrimination, Mr.

Wesnefski's legal fees and expenses could run $100,000 or more and punitive damages could be even higher. RPC asserts that Attorney Maass only discussed the defense cost of going through the next phase of the case without any discussion as to RPC's exposure to compensatory damages, attorneys fees, or punitive damages.

Settlement discussions at the ENE arrived at a point where RPC had offered $10,000 in settlement and Mr. Wesnefski's demand was $65,000. At that point negotiations ended. Attorney Maass was advised by the Early Neutral Evaluator that Mr. Wesnefski was not going to budge from the $65,000 demand. Attorney Maass did not call Mr. Barrett to see if he wanted to increase his authorization. At no time prior to the termination of the ENE did Attorney Maass ever inform Mr. Barrett, or Michael Lannon, RPC's Human Resources Director, that the remaining costs of proceeding to trial would likely exceed the demand of $65,000, even if RPC prevailed. RPC asserts that if Attorney Maass had called Mr. Barrett and recommended that he increase the settlement authorization amount he would have done so.

Immediately following the ENE, Attorney Maass sent a Memorandum to Mr. Barrett in which he stated in part, "There is no sense even negotiating with such people." Attorney Maass further acknowledged that updated information on Mr. Wesnefski's employment and wages would be needed to accurately assess potential damages, but that they didn't appear to be significant and certainly less than $65,000.

As of September 2000, RPC was aware that Mr. Wesnefski's economic expert had rendered opined that his lost wages claim associated with the wrongful discharge claim, alone, had a value of $247,872. RPC's own expert was opining that compensatory damages for lost wages was $78,000.

In November 2000, Attorney Maass told Mr. Barrett that Mr. Wesnefski's claim of wrongful discharge had merit, but that he thought RPC had a good case on the discrimination claim. He also informed Mr. Barrett that there were no guarantees as to any outcome in the case. These opinions, particularly the opinion that RPC had a good case on the discrimination claim, were consistently held by Attorney Maass.

In March 2001, Attorney Maass was informed by Mr. Wesnefski's attorney that a payment of "six figures" (i.e., at least $100,000) would be required to settle the lawsuit. In response to this figure, Mr. Lannon told Attorney Maass that there was "no way" RPC would pay that much. During this period, Mr. Barrett repeatedly asked Attorney Maass if there was any chance of settling the case, to which Attorney Maass replied, "No, we're going to trial."

RPC asserts that it is common practice for insurance carriers to ask for a written assessment as to the range of possible outcomes and probabilities. Attorney Maass never provided a complete written assessment to Mr. Barrett or Mr. Lannon. RPC further asserts that Attorney Dowling was aware that insurance companies typically ask defense counsel to prepare a risk assessment outlining the range of possible judgments, including the worst case scenario, and the risks of various possibilities occurring. In response to a request from Mr. Barrett, Attorney Dowling never asked or suggested to Attorney Maass that he do such a risk assessment, even though Attorney Dowling was in a position to do so.

By June 2001, RPC was aware, by virtue of a draft audit report update sent by Attorney Maass to Mr. Lannon, that Mr. Wesnefski was going to be claiming approximately $288,000 in lost income, and there was potential exposure of

approximately $100,000 in attorneys fees to Mr. Wesnefski if he were to prevail on his discrimination claims. RPC asserts that this draft audit letter was provided to Mr. Barrett 20 days prior to the trial, and that it was the first indication from Attorney Maass or Attorney Dowling that the case had any real and substantial potential of having a materially adverse impact on RPC.

The jury returned a verdict in the amount of $703,649, comprised of $244,960 for front and back pay on the wrongful discharge claim, and $458,689 in punitive damages on the discrimination claim. Following the jury verdict, the Court reduced the punitive damages award to $200,000, awarded attorneys fees of $157,528.37 and costs of $6,172.82, and entered final judgment in the amount of $608,661.23. RS&C represented RPC in the post-trial motion practice and settlement negotiations. Post-trial negotiations resulted in an agreement with Mr. Wesnefski that he would accept $550,000 in full and final settlement of his claims against RPC.

Discussion

A lawsuit against an attorney for negligence generally requires: (1) the existence of an attorney-client relationship which establishes a duty of care; (2) the negligence of the attorney measured by his or her failure to perform in accordance with established standards of skill and care; and (3) that the negligence was the proximate cause of harm to plaintiff. *Hedges v. Durrance*, 2003 VT 63, ¶ 6, 175 Vt. 588 (mem.) (citing *Brown v. Kelly*, 140 Vt. 336, 338 (1981); *Bresette v. Knapp*, 121 Vt. 376, 380 (1960)).

Typically, professional negligence by an attorney is demonstrated through the use of expert testimony: (1) to explain the proper standard of skill and care for the profession; (2) to show that the attorney's conduct deviated from that standard of care; and (3) to

establish that this conduct was the proximate cause of the plaintiff's harm. *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497 (1998).

The Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material, *Robertson*, 2004 VT 15, ¶ 15, and the nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver*, 2003 VT 71, ¶ 2.

Plaintiff has proffered evidence: (1) as to the standard of care for an attorney in the jurisdiction of Vermont; (2) that defendants failed to meet this standard by not properly advising plaintiff as to the risks and costs associated with trial; and (3) that this failure to advise plaintiff was the proximate cause of the case going to trial and plaintiff's subsequent harm upon verdict. As such, there is a genuine issue of material fact and defendant is not entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

ORDER

Defendants' Motion for Summary Judgment, filed October 17, 2008, is DENIED.

Dated at Rutland, Vermont this _____ day of _____, 2009.

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Hon. William Cohen
Superior Court Judge