

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-2266-FT
STATE OF WISCONSIN**

Cir. Ct. No. 02-SC-1415

**IN COURT OF APPEALS
DISTRICT IV**

PARKE O'FLAHERTY, LTD.,

PLAINTIFF-RESPONDENT,

V.

PATRICIA M. KNUTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Patricia M. Knuth appeals a judgment of the circuit court awarding money damages to Parke O'Flaherty, Ltd., represented in

¹ This is an expedited appeal under WIS. STAT. Rule 809.17 (2001-02), decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

this action by Attorney Patricia Heim. Attorney Heim represented Knuth in a divorce action and during the course of that representation an appraiser was hired. The appraiser billed Heim for the work and later sued Heim for payment. Attorney Heim paid the bill and then brought this action against Knuth to recover the money Heim paid the appraiser. Knuth argues that the judgment should be overturned because Heim, as Knuth's agent, paid the bill against Knuth's wishes and thus violated Heim's fiduciary duty. We disagree and affirm the circuit court.

Background

¶2 This case began with Attorney Heim's representation of Knuth in Knuth's divorce action. Attorney Heim's law office is in La Crosse. The parties entered into a retainer agreement, which included the following provision covering expenses related to experts: "If the expert does not ask [Knuth] to execute a separate agreement, but bills the law firm directly, [Knuth] understand[s] that [Knuth] will still be responsible for the payment of the expert's fees."

¶3 As the case proceeded, Knuth and Attorney Heim conferenced with appraiser Richard Wanke over the telephone. Wanke gave Knuth an estimated fee for services of between \$500 to \$700 for each of her two businesses, and Knuth hired Wanke.

¶4 Eventually, Wanke submitted a bill to Attorney Heim for \$2,975.00. Knuth objected to the amount because she thought it was excessive in relationship to the estimate. Knuth attempted to settle the bill by instructing Heim to offer a settlement of \$1,200.00 to Wanke.

¶5 Wanke rejected the offer and, on February 13, 2002, filed suit against Heim in small claims court in Eau Claire County, seeking the originally

billed amount, \$2,975.00, plus interest. The total amount Wanke sought was \$3,573.59, plus court costs. On February 21, 2002, Heim was served with the small claims suit and on that same day, Heim wrote Knuth, informing Knuth of the summons and complaint and telling her that because the complaint required Heim to file a written response and appear personally, Heim would pay Wanke and sue Knuth to collect the fees. Heim stated: "I cannot justify the time that it would take me to defend this law suit and appear in court. I am sure you do not want to pay for all of the fees that will be incurred if I were to defend this suit myself." Heim also stated: "I am not going to send the check to Mr. Wanke until March 8 or so, so there is some time for negotiations, if possible."

¶6 On March 6, 2002, Attorney Erwin Steiner, a different attorney employed by Knuth, faxed a letter to Attorney Heim informing Heim that Knuth believed a viable defense was available to the small claims lawsuit and offering \$1,400.00 to Heim to resolve the matter as between Heim and Knuth.

¶7 In a letter dated March 7, 2002, Heim rejected Knuth's offer, and suggested that Knuth arrange for Attorney Steiner, who was situated in Eau Claire, to represent Heim in defense of Wanke's small claims court action. Attorney Heim indicated she found it unacceptable that she, Heim, should pay the full bill and receive only \$1,400.00.

¶8 On March 8, 2002, Knuth faxed another letter to Heim. In many respects the letter is unclear. On the one hand the letter states "you have a duty to Ms. Knuth to defend against an excessive claim, if you believe it to be excessive," suggesting that Knuth was the real party at risk in the lawsuit and that Heim should represent Knuth's best interest in the suit, which was to contest the amount of the bill. This might suggest that Attorney Heim would be reimbursed by Knuth

for the expense of litigation and any judgment. On the other hand, the letter plainly advises Heim that should Heim later seek full reimbursement from Knuth, “I trust you understand ... you must prove a case within a case: i.e. the burden will be upon you to prove the existence of an agreement by Ms. Knuth to pay the amount, and the reasonableness.” The letter also suggests that Heim could limit her litigation expenses by requesting the “professional courtesy of a local Eau Claire attorney to appear in your behalf ... on the return date.” Without explanation, the letter states: “Obviously, that attorney could not be me.” These statements, as we discuss below, communicate that Heim is not being asked to represent Knuth in the small claims suit and that Knuth does not intend to pay related expenses.

¶9 Attorney Heim subsequently paid Wanke the full amount sought in the small claims action and filed a small claims action against Knuth seeking reimbursement. At a hearing, Knuth testified that Heim paid Wanke against Knuth’s wishes. The circuit court entered judgment in favor of Heim against Knuth.

Discussion

¶10 Knuth argues that she is not liable for damages incurred by Heim because Heim acted contrary to Knuth’s instructions. The parties do not address the appropriate standard of review to employ here. We note that the facts are undisputed in this case and the issue on this appeal is whether the undisputed facts permit judgment for Heim. The question of whether facts fulfill a particular legal standard is a question of law. *Eastman v. City of Madison*, 117 Wis. 2d 106, 112, 342 N.W.2d 764 (Ct. App. 1983). We review a question of law without deference

to the circuit court. *Glover v. Marine Bank*, 117 Wis. 2d 684, 691, 345 N.W.2d 449 (1984).

¶11 Knuth contends that Heim paid Wanke against Knuth's wishes and, therefore, Heim, as Knuth's agent, is liable for the damages Knuth sustained as a result. We would be inclined to agree if, in fact, Heim was acting as Knuth's agent at the time she paid Wanke. For example, if Knuth had simply told Heim to fight the small claims action on Knuth's behalf, there would be no question that Knuth would have been liable for any amount awarded to Wanke and for expenses Heim incurred in defending Wanke's claim. Under this scenario, if Heim refused to defend Knuth and instead paid Wanke the amount he requested, Knuth would have an arguable claim against Heim for damages suffered as a result of Heim's unauthorized actions. However, the exchange of letters in February and March 2002 demonstrates that we do not face that scenario here.

¶12 Prior to the time Attorney Steiner exchanged letters with Attorney Heim in March 2002, Heim was plainly Knuth's agent for purposes of the Wanke bill, and during this time period Heim had a duty to protect Knuth's interests. *See Gustafson v. Physicians Ins. Co. of Wis.*, 223 Wis. 2d 164, 175, 588 N.W.2d 363 (Ct. App. 1998). “[A]n attorney has a duty of loyalty to his or her client. Part of this duty includes acting in the client's best interests during the course of the representation.” *Id.* at 177 (citations omitted). “It has generally been recognized that [attorneys] may be liable for all losses caused by [their] failure to follow with reasonable promptness and care the explicit instructions of [their clients].” *Olfe v. Gordon*, 93 Wis. 2d 173, 182, 286 N.W.2d 573 (1980) (quoting Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1302 (1963)). “The attorney-client relationship in such contexts is one of agent to principal, and as an agent the attorney ‘must act in conformity with his authority and instructions and is

responsible to his principal if he violates this duty.” *Olfe*, 93 Wis. 2d at 182 (quoting *Ford v. Wisconsin Real Estate Examining Bd.*, 48 Wis. 2d 91, 102, 179 N.W.2d 786 (1970)).

¶13 We have carefully reviewed the exchange of letters in February and March 2002. It is clear from these letters that at the time Heim paid Wanke she no longer shared an agency relationship with Knuth with respect to the Wanke bill. On February 21, Heim wrote that Knuth would not “want to pay for all of the fees that [would] be incurred if I were to defend this suit myself.” Rather than authorize Heim to represent her, Knuth responded by directing Attorney Steiner to offer Heim \$1,400.00, less than half the bill, to settle the matter *as between Knuth and Heim*. Heim responded by rejecting the settlement offer and suggesting that Knuth hire Attorney Steiner to represent Heim in the small claims action. In his letter dated March 8, Steiner stated that “[o]bviously,” he could not represent Heim. The only reasonable explanation why it was “obvious” that Steiner could not represent Heim is because Heim and Steiner’s client, Knuth, were adverse parties with regard to Wanke’s bill, and it would be a conflict of interest for Steiner to represent Heim, further demonstrating that Heim and Knuth did not share an agency relationship.

¶14 Moreover, Attorney Steiner suggested ways that Heim could reduce her litigation costs, without any indication that Knuth would reimburse Heim for those costs. And Steiner informed Heim that if she sought reimbursement from Knuth for paying the full amount of the bill, Knuth would fight Heim in court on the merits, leaving Heim liable for the portion of the bill that Knuth disputed. This exchange of letters would have informed any reasonable attorney in Heim’s position that she was not authorized to represent Knuth in disputing Wanke’s claim. Indeed, if Heim had traveled to Eau Claire, fought the Wanke lawsuit, and

then billed Knuth for her expenses, the letters from Steiner would have rebutted a claim by Heim that Heim incurred the expenses acting as Knuth's agent.

¶15 Accordingly, Knuth's argument does not withstand scrutiny. She contends that Attorney Heim was obliged to follow Knuth's direction and contest the Wanke bill because Heim was her agent for that purpose. However, letters sent by Knuth's second attorney, Attorney Steiner, severed that agency relationship. Heim was not required to expend her time and money to defend against a claim for which she was not liable. In this context, the trial court correctly pointed out that Knuth should have moved to intervene in the Wanke lawsuit if she wished to contest the bill.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

