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Texas Decides That Assignment of Cause of Action in Any Form is Void

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627 (Tex.App. 2000). This is the first American decision implicitly holding that the form of assignment does not prevail over substance. Acknowledging that the Texas Supreme Court in *Mallios v. Baker*, 11 S.W.3d 157 (Tex.2000) did not decide the issue of the form of an assignment, the Court of Appeals in *Tate* had the issue squarely presented. The client faced a $233,166 default judgment because his lawyer did not file an answer. The lawyer claimed that opposing counsel had granted an extension of time. After an unsuccessful motion for a new trial, the client agreed to bring a legal malpractice action and assigned all but 10 percent of the legal malpractice claim in exchange for an agreement not to execute on the judgment. Under the agreement, the former adversary had control over the litigation. The court said that the same policy concerns against an assignment existed, although the client reserved a fractional portion of the claim prosecuted in his name. The assigned portion could not be pursued, though the client could proceed on the portion of the claim he retained.

"But For" Causation Applies to Settlement

Nielson v. Eisenhower & Carlson, 100 Wash.App. 584, 999 P.2d 42 (2000). This case concerned a client who elected to settle during an appeal because the lawyer's negligence created a risk of reversal. The client claimed that the lawyer provided negligent advice, which did not affect the result of the lawsuit, but allegedly was why the plaintiffs settled their case on appeal. The plaintiff consulted with the defendant regarding a medical malpractice claim against the federal government. He told the defendant they had three years to sue. They prosecuted the action successfully with other counsel, though the government raised the defense of the two-year discovery statute of limitations. The trial court found that the plaintiffs did not learn of the child's brain injury until 15 months after her birth. While an appeal was pending on that issue, the plaintiffs settled for 85 percent of judgment, almost three million dollars. They then sued the defendant for the difference, contending that his erroneous advice created the risk of a reversal. The court rejected their assertion that a subjective standard, plaintiffs' concern about reversal, should control causation. Citing policy considerations, the court concluded that a lawyer's liability should be determined by "but for" causation, whether the judgment would have been reversed because of the lawyer's negligence. The court found that it would not have been reversed.

The court discussed proximate cause, distinguishing between cause-in-fact, "but for" causation, which turned on the immediacy of the connection, and "legal causation," which turned on the policy consideration of the extent of the consequences of conduct. Citing to the "unique characteristics" of legal malpractice litigation, the court said that the "but for" test was appropriate in legal malpractice cases to establish that the conduct caused the injury. In the context of an appeal, the but-for causation requires proof that the client would have been successful.

Plaintiffs argued the test should be subjective, whether the settlement was "reasonable." The court held that "but for" causation applied to the case-within-a-case methodology, and the clients had to prove that the lawyer's error would have prevented success on appeal. Because the appeal would not have succeeded, there was no proximate causation, and the summary judgment was properly entered. The court cited to the Washington Supreme Court's decision, which rejected a "loss of chance" causation analysis. *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600 (1985).

Nielson illustrates the policy concerns regarding the ability of a client to consciously avoid a risk by a settlement, allegedly made necessary by a lawyer's error, though under "but for" analysis, the error did not impair the validity of the claim or defense. Although the lawyer's error may have created the risk, the policy concern is that

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lawyers should not become guarantors of the client's rights solely because a client chose a compromise over the risk of resolving the issue.

Local Counsel Not Liable for Missed Statute of Limitations

Armour v. Lantz, ___ W.Va. ___, ___ S.E.2d ___, 2000 W.Va.LEXIS 97 (2000). A West Virginia lawyer was able to avoid liability for the errors of Ohio counsel. Ohio counsel requested that the West Virginia lawyer file the plaintiffs' personal injury action, which he did, based on questionable facts and a draft complaint. The action was dismissed based on the two-year statute of limitations. The clients sued all lawyers, contending that the action should have been filed in Ohio, where they could have had the benefit of a three-year limitation period. The clients contended that the West Virginia lawyer should have recognized that the action was time-barred in that state and should have counseled them to that effect.

The court's analysis concerned whether the role of local counsel was a joint venture, the primary focus being whether there was a sharing of profits and losses in the representation. The court explained that policy supported a reluctance to find vicarious liability because of the need for local counsel and the common practice for the out-of-state lawyer to associate and maintain primary responsibility for the client's representation. A contrary rule could result in local counsel declining such representation or having to assume a much greater responsibility than desired by a client, solely to protect against potential liability. In affirming summary judgment for the lawyer, the court explained that there was no sharing of profits, no participation in the development of strategy and the limited role of local representation.

Under California Law a Derivative Action for Legal Malpractice Violates Public Policy

McDermott, Will & Emery v. Superior Court, 83 Cal.App.4th 378, 99 Cal.Rptr.2d 622 (2000). A derivative lawsuit is not by the client but on behalf of the client by its shareholders. The shareholders, however, are not the holders of the attorney-client privilege. As a result, the filing of a shareholder derivative action against a corporations' outside counsel does not waive the privilege, which would happen when the client itself sued for malpractice. If a derivative action were allowed to proceed, the defendant attorney would be effectively foreclosed from mounting any meaningful defense.[1] In addition, a shareholder derivative action against an extracorporate third party is not an assignment of the corporate claim to the shareholders. For these reasons, the derivative action could not proceed.

[1] The court's assumption that the attorney-client privilege would prevent the lawyer from presenting a defense is not necessarily the case. California Evidence Code §958 does not restrict the exception to situations only where the client is making the charges:

> There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

The lack of judicial interpretation of this exception leaves the answer uncertain, but §958 at least raised the possibility that the privilege would be waived even if the shareholders, rather than the corporate client, sued the corporation's attorney.

Auditor Malpractice Cause of Action is Assignable

KPMG Peat Marwick v. National Union Fire Insurance Co. of Pittsburgh, Pa., ___ So.2d ___, 2000 Fla.LEXIS 1462 (Fla.2000). In a carefully worded opinion, the Florida Supreme Court allowed assignment of a malpractice claim against an accountant, as an independent auditor. The court noted the absence of a confidential counsel role, an advocacy situation and the lack of confidential communications. Thus, the court reinforced prior decisions invoking public policy concerns as precluding assignment of a legal malpractice cause of action, principles that could apply to accountant activities outside the audit function.

Lawyer Entering Special Appearance is Associated Counsel

Streit v. Covington & Crowe, 82 Cal.App.4th 441, 98 Cal.Rptr.2d 193 (2000). A law firm obtained summary judgment on the basis that it had no attorney-client relationship because it only "specially appeared" for the plaintiff on a summary judgment motion as a courtesy to counsel of record. The appellate court disagreed, holding that the law firm was associated counsel, although the retention had been by the plaintiff's counsel of record. Although the scope and extent of the duties presented an issue on remand, the relationship was that of attorney and client.

Oklahoma Law Firm Has No Duty to File Lawsuit in Texas

Norton v. Hughes, 2000 OK 32, 5 P.3d 588 (2000). Oklahoma lawyers agreed to pursue remedies arising out of the client's purchase of three emu birds. The lawsuit, filed in Oklahoma against the Texas defendants, was dismissed for lack of *in personam* jurisdiction. The lawyers told the client they could not file the lawsuit in Texas because they were not licensed to practice law in that state. Attempts to find a Texas lawyer to file the lawsuit failed. The statute of limitations eventually ran. The client sued for legal malpractice for filing in the wrong venue.

The claim failed for lack of a duty. The lawyers were not able to practice law in Texas and made reasonable efforts to find a Texas attorney. The court observed, "the value of a local attorney cannot be underestimated - it is a public policy issue that supports the current unauthorized practice of law statutes and *pro hac vice* requirements in both Oklahoma and Texas." The court cited the need for knowledge of the local requirements, which can be imperative. In fact, local counsel commented on the reputation of the prospective defendant and the reluctance of local Texas citizens to be antagonistic. The dissenting justices believed that the contract required the lawyers to proceed and that they should have done so *pro hac vice*.

Accounting Firm's Use of Employed Lawyers Did Not Create Attorney-Client Relationship

Mellon Service Co. v. Touche Ross & Co., 17 S.W.3d 432 (Tex.App. 2000). A Texas judge granted summary judgment in favor of an accounting firm on the claim of breach of a fiduciary duty arising out of an attorney-client relationship. The opposing evidence was that two of the members of the tax team on the client's account also were lawyers. The lack of an express retainer for legal services and knowledge that accounting services were to be provided negated the claim.

Law Firm Not Liable for Failing to Anticipate Disqualification of Judge

First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983 (9th Cir. 2000). A California law firm was sued for failing to properly screen a former judicial law clerk of the bankruptcy judge presiding over the client's matter. The judge apparently knew of her clerk's new employment. The judge ruled favorably for the law firm's client, but recused herself to avoid an appearance of impropriety when she learned that her former law clerk had some contacts with the matter. A new trial before the successor judge was adverse to the client.

The client contended that the law firm should have provided advice of the risk of disqualification when hiring the clerk, and notice to opposing counsel and the judge to avoid that risk. Although the court agreed that lawyers had a duty of the disclosure, that did not include tenuous possibilities. A new trial was not a foreseeable risk because, under Canon 3(C)(2) of the Judicial Conduct Canon, the judge is responsible for the conduct of the judge's staff. Further, under Canon 5(C)(1) of the Code of Conduct for Law Clerks, the burden was on the clerk to not be involved in related matters within the law firm. The court said that the law firm is "entitled to assume that judges (and law clerks) will perform their duty." The court emphasized that the burden was on the judge and the clerk.

The court stated:

> Typically (and consistent with the duty to avoid the appearance of impartiality), in these circumstances a judge would either tell the clerk not to do anything on the matter, or disclose the clerk's disqualification on the record and proceed only if the disqualification were waived.

The judge did not seek waivers and merely informing the clerk not to do "substantive work" on the matter was insufficient. Here, the law firm had no reason to believe hiring the law clerk would affect the judge's impartiality. The fact that the ethical wall failed did not make the risk of disqualification foreseeable.

Sanction Award Not Dischargeable in Bankruptcy

French Kezelis & Kominiarek, P.C. v. Carlson, ___ F.Supp.2d ___ (E.D.Ill.2000), affirming *In Re Carlson*, 224 B.R.659 (N.D.Ill. 1998). An Illinois lawyer, Dennis Carlson, was sanctioned $20,689 under the state statute for a frivolous lawsuit, to be paid to the opposing law firm. A few years later, the lawyer sought to discharge the debt but the law firm objected. The bankruptcy court

held that the debt resulted from willful and malicious conduct and was non-dischargeable under §523(a)(6). The district court agreed that the bankruptcy judge could rely on the factual finding of the circuit court in the Rule 137 motion that the conduct was willful and malicious.

Defamation Privilege Applies to Prospective Client

Pop v. O'Neil, ___ Ill.App.3d ___, ___ Ill.Dec. ___, ___ N.E.2d ____ (2000). The defamation privilege provides absolute immunity for statements made in relation to a legal proceeding. A related issue is whether the privilege applies to a prospective client. The Illinois Appellate Court so held concerning remarks in a letter declining the client's representation. The court observed that not only were the same policy considerations implicated, but also that such communications usually were protected as privileged.

The law firm declined representation because of the concern that the plaintiff, a business associate of the prospective client and prospective witness, hated the firm. In prior litigation, the law firm's client obtained a substantial judgment against the plaintiff, who allegedly "lied on the stand."

Extrinsic Evidence Can Include All Documents Compromising the Estate Plan

Bullis v. Downes, 240 Mich.App. 462, 612 N.W.2d 435 (2000). Michigan courts follow the rule that extrinsic evidence is not admissible to vary the intent of a will. Although a Michigan appellate decision agreed with that proposition, it held that the estate plan was not necessarily limited to the will and could include other documents. Pursuant to a will and a contemporaneous revocable trust, two deeds transferred real property to the trust. The will provided that the plaintiff was to receive the two properties. The will also provided in a pour-over provision for delivering the residue of the estate to the trust for distribution to the three children. The trust did not specify how the real property was to be divided. Plaintiff's brothers argued that the delivery of the two properties meant that they were to be divided among all three children, not just to their sister. The dispute was compromised. In defense of the legal malpractice action, the lawyer argued that the plaintiff could not prove her entitlement without evidence of the deeds. The court acknowledged that whether to integrate other documents could present a question, but there was no dispute that the deeds were intended to be part of the estate plan.

Texas Supreme Court Holds that Defense Counsel Can Be Liable to an Excess Insurer

Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh, Pa., 20 S.W.3d 692 (Tex. 2000). A Texas Supreme Court decision reversed a summary judgment in favor of defense counsel in an action by an excess insurer. The primary insurer rejected a $3.6 million settlement demand, but later tendered its $1 million policy limits to the excess insurer, which two days later settled for $7 million. Before the settlement, the law firm pressed its client, the insured, for unpaid legal fees on other matters. In consideration of waiving those fees, the client released the law firm from "all demands, claim or causes of action of any kind" to the date of the release. The court held that the release could not support the summary judgment. First, the release did not cover conduct after its specified date. Second, the validity of the release raised an issue of fact because the law firm's advice that "independent representation" would be appropriate was not adequate to overcome the burden of showing that the release agreement was fair and reasonable. Although the law firm could contend that the excess insurer was negligent, the insurer had no duty to pay until the primary insurer tendered its policy limits. On remand, the insurer was required to prove that the law firm's negligence caused it to pay more.

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