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Thomas C. Pappalardo v. Philip C. Pugsley : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THOMAS C. PAPPALARDO and HELENA C. PAPPALARDO, Plaintiffs and Appellants vs. PHILIP C. PUGSLEY and HARRY D. PUGSLEY, Defendants and Respondents	APPELLANTS' BRIEF Case No. 14685

BRIEF OF PLAINTIFFS - APPELLANTS

An Appeal from the Judgement of the District Court of the Third Judicial District, The Honorable Gordon R. Hall, Judge

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STATEMENT OF KIND OF CASE

This is an action to recover damages against the defendants in which plaintiffs allege that defendants were engaged by the plaintiffs to answer complaints with the resultant loss of the equities in properties in which the defendants failed to protect the record, by answering the Complaints which they received from the Plaintiffs.

No allegations of fraud have ever been made and none were ever intended against the defendants. Prior to the plaintiffs' engaging the defendants in this action they, the Plaintiffs, had purchased equities in six pieces of real property, had made the payments and were renting the properties. The plaintiffs then engaged Pacific States Investments Inc. to assist in the collection of rents and conveyed their equities in the properties to the Pacific States Investments Inc. and in return received a promissory note in the

amount of $30,000, the same to be paid in $600-a-month payments, and in addition thereto the Pacific States Investments Inc. agreed to keep current payments that should become due and owing on the contracts of purchase; thereafter, the Pacific States Investments Inc. failed to keep the contracts current and became in default on all of the contracts. Plaintiffs then engaged the defendants to bring an action to set aside their conveyances which they had made and recover the properties. Plaintiffs allege that upon receipt of notice of the defaults, and upon being served with summonses and complaints to foreclose their equities, they took each of the notices of defaults, summonses and complaints to the defendants, and engaged them to protect the record and recover the equities back for them. Plaintiffs allege that they instructed the defendants that they had enough equity to refinance the contracts, thereby taking up the defaults and to bring each of the contracts current; plaintiffs allege that the defendants assured them that they would contact Mr. William G. Cayias, who was the attorney for Pacific States Investments, Inc., and they would have them either bring the contracts current or file such pleading as defendants deemed proper in order to give the plaintiffs time to refinance the contracts and bring them current and to set aside the conveyance of the equities which the plaintiffs had made to Pacific States Investments, Inc.; thereafter, the defendants did commence an action to recover the equities of the plaintiffs and was successful in recovering two of the six parcels; as to the remaining four parcels the plaintiffs allege that the defendants failed and neglected to answer or otherwise plead to the foreclosure actions being brought by the fee holders,

and as a result thereof the four pieces of property were lost and the plaintiffs thereby suffered damages, together with the loss of the rent which they would have recovered.

DISPOSITION OF THE LOWER COURT

After the plaintiffs rested their case, the defendants moved for a directed verdict, which motion was thereupon duly granted.It is from the ruling of the Court directing a verdict in favor of the defendant, Harry Pugsley and against the plaintiffs this appeal is taken

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to reverse the ruling of the lower Court in which defendants' motion for a directed verdict was granted as to defendant, Harry Pugsley, and to have this Honorable Court order a new trial.

ARGUMENT

POINT I

THE DISTRICT COURT WAS IN ERROR IN ITS REASON FOR GRANTING A DIEECTED VERDICT ON THE GROUND THAT PLAINTIFFS HAVE FAILED TO BEAR THE BURDEN OF PROOF OF A REASONABLE DUTY OF THE DEFENDANT HARRY PUGSLEY AND HAS OFFERED NO EXPERT TESTIMONY TO SUPPORT WHAT THE DUTY WAS.

The plaintiffs, Thomas Pappalardo (Tr. P. 137, Ls. 25 to 28), testified that he first saw Mr. Harry Pugsley concerning a transaction he had entered into in which his property was not secured; he had conveyed his equity in certain properties to Pacific States Investments, Inc. with an agreement that Pacific States Investments, Inc. would collect rents, pay the title holders, and after deducting its commission send the balance to plaintiffs. After commencing an action for plaintiffs against Pacific States Investments, Inc., a stipulation was entered into in which it was recognized that the payments were delinquent and the Pacific States Investments, Inc. would bring the payments current. (See plaintiffs' Exhibit 1-P).

Plaintiff, Thomas Pappalardo, testified that thereafter and subsequent to the stipulation he would receive summonses and complaints in which the title holders sought to foreclose plaintiffs' equities. He testified that he, with his son-in-law, Paul Sharrot, took the summonses and complaints to Mr. Harry Pugsley. Plaintiff told Pugsley in substance that he had enough equity in the properties to refinance them and bring them current. (Tr. p. 65, Ls. 19 to 28).

This plaintiff further testified that Mr. Harry Pugsley told him "don't be concerned, I will take care of this for you and will give you ample time so that you can borrow the money or make arrangements to get this money," so these things would be satisfactory with the title owners. (Tr. p. 66, Ls).

Again this plaintiff testified that Mr. Harry Pugsley told him that he would talk to Mr. William Cayias, who represented Pacific States Investments, Inc. and have Mr. Cayias' client bring the contracts current; that if Mr. Cayias failed, defendant Harry Pugsley would file a pleading in plaintiffs' behalf that would give them time to refinance the properties. (Tr. p. 65, Ls. 19 to 30 - Tr.66 - 1 - 13). Again approximately two months later plaintiff went with Mr. Sharrot to the office of Mr. Pugsley and talked again about raising the money to keep the contracts current. (Tr. pp. 67, 68, 69, 70, 71).

The substance of all the conversations was that defendant Pugsley would call Mr. Cayias to see if the Pacific States Investments, Inc., would bring the contracts current; that he would file an answer, or otherwise plead to the complaints to avoid defaulting plaintiffs on these contracts. This was repeated in cross examination. (Tr. p. 87, Ls. 6 to 14) (Tr. 89, Ls. 8 to 13).

In substance the witness, Paul Sharrot testified to having been with the plaintiff, Thomas Pappalardo, and that plaintiff told Mr. Pugsley he could raise the money to refinance the defaulting contracts if he could have a little time. (Mr. Sharrot - Tr. p. 103, Ls. 18 to 27), "and on all of these occasions he did say he would answer these summonses and complaints to Pappalardo." It is evident from the subsequent loss of the properties that

defendants failed and neglected to answer these summones and complaints.

Therefore, we respectfully submit that the trial Court in its ruling held that plaintiffs had failed to show by expert testimony that Mr. Pugsley had a duty to answer the summonses and complaints which plaintiff and his son-in-law, Sharrot, delivered to him. . . This does not involve a question of whether or not defendants gave proper advice and counsel to plaintiffs but simply whether defendant, Harry Pugsley, had a duty to answer the complaints when plaintiff, Thomas Pappalardo, gave them to defendant, Harry Pugsley, and Mr. Pugsley agreed to file answer. In other words it is plaintiffs' simple position that defendants failed to file responsive pleadings in accordance with defendant, Harry Pugsley's, promise to do so and that does not require professional legal testimony to establish a duty on the part of defendant to file responsive pleadings.

This is a changing area of the law. In Gambert v. Hart, 44 Cal 542 (1872) the Court said in substance that the testimony of an expert witness was not admissible as it went to the ultimate fact in issue while the question of want of skill of an attorney was a question of law for the court.

Expert evidence as to standards of practice and negligence are now generally admissible. The recent case of Starr v. Mooslin, 14 Cal App. 3d 988, 92 Cal. Reptr 583 stated that the Gambert case did not express present law. Reported cases from Maryland, Arkansas, Alabama, and Louisiana reveal the same general allowance of expert testimony in legal malpractice actions now.

But the real question is whether the law has turned the arc to the point where expert testimony is required for judgment against an attorney. The answer seems to be 'sometimes'. The current state of the law might best be expressed as follows:

The law prevailing in some states and there are no Utah cases on this point, seems to be that expert testimony as to standards of practice and negligence is necessary for the determination of the question. This

in Maryland the courts also have held that expert testimony is not required where attorney representing the plaintiff made such a clear violation of his duty that the trial court could have ruled on it as a matter of law. (Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662.)

In the case of Sanders v. Smith, 83 NM. 706, 496 P.2d 1102 (1972) The defendant presented the court with three affidavits from other attorneys verifying that the course taken by the attorney was not negligent. The plaintiff countered with nothing. A motion for summary judgment by the defendant was then granted. After confusing medical and legal malpractice the court stated that after the defendant attorney sustained his burden to establish the absence of a fact issue by expert testimony, the plaintiffs could not remain silent. They must apprise the court of available expert testimony and then produce it. This is saying, in effect, that the prima facie case does not require expert testimony; in fact, expert testimony would only be required to counter the defendants. In a case later in the same year the same need for an expert witness was listed as a requirement by the New Mexico court but in this case the attorney was the plaintiff claiming that the terms of a contract had been breached by the attorney and the breach constituted good cause to dismiss his services. (Walters v. Hastings, 84 NM. 101, 500 P.2d 186 (1972).)

See 17 A.L.R. 2d 1442 at page 1444.

In the case of Olson vs. North, 276 Ill. App. 457, wherein the Court in discussing the duty owed by an attorney to his client, stated (page 473) quoting from a former unpublished opinion:

> "When a person adopts the profession of law, if he assumes to exercise the duties in behalf of another for hire and regard, he must be held to employ in his undertaking a reasonable degree of care and skill. If injury results to the client from the want of such a degree of reasonable care and skill, he must respond in damages to the extent of the injuries sustained. It is the duty of an attorney to bring to the conduct of his client's business the ordinary legal knowledge and skill common to members of the legal profession,

to act toward his client with the most scrupulous good faith and fidelity, and to exercise in the course of his employment that reasonable care and diligence which is usually exercised by lawyers."

In Walkenhorst vs. Kesler, 92 Utah 312, 67 P.2d 654 it is stated:

"The case of Baxter v. Snow, 78 Utah 217, 2 P.(2d)257, 265, is cited as an authority for the proposition that, in the absence of expert testimony on the part of plaintiff in malpractice cases, there is not sufficient to take the case to the jury. The Baxter-Snow Case is not analogous to the case at bar. The case of Perkins v. Trueblood, 180 Cal. 437, 181. P. 642, is cited. Quoting from the case of McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870, the following is said:

"Negligence on the part of a physician consists in his doing something which he should not have done.*** What is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts and can be established only by their testimony."

The quotation would seem to justify the citation and argument. The Baxter v. Snow Case does not, either in decision or argument, go so far. It holds the doctrine of res ipsa loquitur does not apply to a malpractice case such as the case there under consideration, the court saying:

"We do not say that the rule, as to the necessity of expert testimony as stated in the cases referred to, applies in all malpractice actions. A treatment may so plainly indicate that the physician or surgeon was negligent, or that an act done or failed to be done so obviously did not involve skill, as not to require any opinion of an expert as to the performance or nonperformance of the act."

POINT II.

THE DISTRICT COURT WAS IN ERROR IN ITS SECOND FINDING THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO WARRANT A FINDING THAT THE PLAINTIFFS HAD BEEN DAMAGED AS A RESULT OF LEGAL SERVICES PERFORMED OR NOT PERFORMED BY THE DEFENDANTS.

Judge Hall in his ruling and comments from the bench stated: (Tr. p. 137 ls. 25 to 30 - p. 138 ls. 1 and 2) "The Court is of the opinion that the plaintiffs have failed to bear the burden of proof here as to the reasonable duty of the defendant Harry Pugsley, and has offered no expert testimony to support what the duty was; and further that the plaintiff has failed to bear the burden of proof as to proximate cause in this matter and for those reasons the Court grants the motion also for a direct verdict to Mr. Harry Pugsley."

In this case the whole case involves the question of whether or not the defendants performed their duty for which they were hired, to-wit, to file responsive pleadings when Plaintiff, Thomas Pappalardo, brought Summonses and Complaints to defendant, Harry Pugsley. Mr. Pugsley stated that he received four summonses and answered two of them (Tr. p. 132, Ls. 2 to 4). Again Mr. Pugsley stated that he turned two of the Summonses over to Mr. Cayias. (Tr. p. 132, Ls. 4 to 13). This of course corresponds to the testimony of Plaintiff, Thomas Pappalardo, and Mr. Sharrot that Mr. Pugsley said he would contact Mr. Cayias. We submit again that Mr. Pugsley's testimony that he handed the Summonses, together with the claims, over to Mr. Cayias, and that the actions were defaulted by Mr. Pugsley's failure to answer the Complaints for which he was hired, was the sole and proximate cause of the injury and resultant damage and loss to Plaintiffs.

In 14 C.J.S. p. 41, causation is defined as follows: "It has been said that where the act is the failure to perform or the omission of a legal duty, causation is established when the doing of the act would have prevented the result."

See also Harvard Law Review 633, 637.

In 86 C.J.S., p. 941 §27, it is stated at page 941 as follows:

> "Generally, a tort-feasor is liable for the natural and proximate consequences of his act, but unless the act complained of is the proximate cause of the injury, there is no legal liability

"In determining liability for a tortious injury, the law looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause and declines to permit further investigation into the chain of events, and, unless the act complaining of is the proximate cause of the injury, there is no legal liability. * * *

"To constitute proximate cause under the rule of many decisions the injury must be the natural and probable consequence of the wrong, that is, such a consequence as, under the surrounding circumstances of the case, might or ought to have been foreseen as likely to flow from the wrong, or, as it has been stated, a proximate cause is a cause that produces the result in continuous sequence and without which it would not have occured, and one from which anyone of ordinary prudence could have foreseen that such a result was probable under the facts as they existed. The particular result need not have been foreseen so long as the wrongdoer might have foreseen that some injury might result."

We therefore submit that the act of omission as alleged by Plaintiffs in Defendant, Harry Pugsley's failure to answer Plaintiffs' Complaint or at least file a pleading to give Plaintiffs an opportunity to raise the money to bring the contracts current was the sole and proximate cause of the loss to Plaintiffs as set forth in their Complaint. There was no other matter involved in this action and particularly in the State of the record when the Court directed a verdict. Had this Defendant done that for which he was hired and paid a retainer, Plaintiffs would have no claim against this Defendant. Further, this simple fact should not require the Plaintiff to prove by professional testimony that an attorney should file an Answer to a Complaint when he is hired for that purpose.

On expert testimony, see also Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App. 1969); Binns v. Schoenbrun, 81 N.M. 489, 468 P. 2d 890 (Ct. App. 1970)

POINT III

THE DISTRICT COURT ERRED IN ITS RULING REGARDING THE ADMISSIBILITY OF EVIDENCE WHICH PLAINTIFFS ATTEMPTED TO ELICIT FROM DEFENDANTS.

Plaintiffs' counsel asked the question (Tr. 128 Line 7-10): "If he stated to you that he could raise the money, if he could get a little more time", isn't it a fact from your general practice, you would protect the record by filing some kind of pleadings to give him more time, if he told you that?" Mr. Hanson thereupon made an objection in substance that Plaintiff had not specified the amount he was talking about and therefore it would be improper to make a valid defense and he (defendant) would have to know the amount of the money before he could answer that question (Tr.128, Lines 11 to 30). The discussion that followed and the ruling by the Court, we respectfully submit was in error. The simple question asked by counsel to precipitate such a discussion and ruling could and should have been answered with a simple "Yes" or "No".

Again, the Court, we submit was in error in its ruling as to the admissibility of the evidence regarding whether or not Defendant, Harry Pugsley, had taken the Complaints to Mr. Cayias instead of answering them. (Tr. 130, Lines 1-28). Mr. Pappalardo had testified that Defendant, Harry Pugsley, had received the summonses from him, the Plaintiff, and had stated that he would talk to Mr. Cayias about having the contracts brought current or in the alternative that he would file a pleading in behalf of Plaintiff that would give Plaintiff time to refinance his properties. (Tr. 66, Lines 1-30). Defendant denied that he had agreed to answer the Complaints. The direct question was asked Defendant who was an adverse witness: (Tr.130, Lines 4-14):

Question by Mr. Duncan: But didn't Mr. Pappalardo ask you to defend those suits?

Answer: No. He did not, those other two -- those others.

Question: But didn't he bring them to you?

Answer: He brought them into the office, yes.

Question: And you instead took it to his opponents?

MR. HANSON: Well now, just a second, I object to that question as a characterization of Mr. Cayias being an opponent. Mr. Cayias' client was an obligor and I object to this as being argumentative in addition.

THE COURT: The objection is sustained.

This testimony was in direct conflict with that of Plaintiff as herein set forth and the Court should have left the question of validity of the testimony to the Jurey.

SUMMARY

Plaintiffs respectfully submit that the Court erred in directing the verdict for the following reason:

The District Court ruled in this case that the Plaintiff had failed to prove that the conduct of the Defendant in failing to answer the Complaints and Summonses which the Plaintiff handed to him, was not in accordance with the general standard of practice in this area and that the Plaintiff had failed to prove this fact by professional testimony.

We respectfully submit that the rule requiring professional testimony as to the general standard of practice in this area regarding attorneys handling matters for their clients is not applicable in this case.

Plaintiffs' Complaint against the Defendant was not misinformation, misjudgment, or any misconduct on the part of Defendant, Harry Pugsley, as one of Plaintiffs' attorneys. The only question involved was whether Defendant, Harry Pugsley, failed in his agreement to answer the Complaints which the Plaintiff, Thomas Pappalardo, states he delivered to Mr. Pugsley and was assured by Mr. Pugsley that he would answer the same or file pleading that would give Plaintiff time in which to refinance the properties and bring the contracts current before the default was entered. In other words, do the Courts of Utah require professional testimony to prove that an attorney should answer a complaint when he receives the copy of the summons and complaint and is paid a retainer for his services. We think not and submit that this involved merely a simple breach of a contract to answer the complaint when he is hired and paid to do so. The failure to answer the complaints with the resultant defaults and loss of plaintiffs'

properties and the damage thereby suffered is so plain and obvious that the failure can be recognized and inferred from common knowledge or experience of laymen without the aid of expert witnesses. We have cited herein authorities so holding and submit that the proposition that there need be professional testimony that the standard of practice in this area requires professional proof that an attorney who is hired and paid a retainer of $1,000.00 to answer a complaint must do so, just does not make common sense.

As to Point II and the Court's comment that plaintiff has failed to bear the burdon of proof as to the reasonable duty of Defendant, Harry Pugsley, to answer the complaints plaintiff gave to him to answer, we submit that the case at bar is just a plain case of failure on the part of this defendant to do that for which he was paid; to answer the complaints served on plaintiffs. Plaintiffs claim no fraud, misrepresentation or poor or improper advice or misjudgment in handling the matters for which defendants were hired, but merely that defendant, Harry Pugsley, failed or neglected to answer the complaints. Plaintiffs are at a loss to understand in view of the evidence submitted, that the trial Court can hold that plaintiffs have failed to sustain the burden of proof as to the proximate cause of the matter of which plaintiffs complain.

As to Point III, plaintiffs respectfully submit that the ruling of the Court precluded plaintiffs from establishing further by way of testimony of defendant, Harry Pugsley, who was an adverse witness, that the defendant had failed in his duty to answer the complaint for which he was hired.

In this case at least upon the state of the records when plaintiffs rested, we submit there is no daubt that the cause of action and claim which plaintiffs have asserted would not have arisen had defendant, Harry Pugsley, answered the complaints for which plaintiffs allege he was hired.

We therefore respectfully submit that plaintiffs are entitled to have the judgment of the District Court reversed and a new trial ordered.

Respectfully submitted,