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Summary of Kahn v. Morse & Mowbray, 121 Nev. Adv. Op. 48

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***Kahn v. Morse & Mowbray*, 121 Nev. Adv. Op. 48 (Aug. 8, 2005)¹**

CIVIL LAW – LEGAL MALPRACTICE

Summary

This action arises out of a business agreement between the Kahns and their son, Eric. The Kahns violated the agreement with Eric by selling their business to their other son, Frank. The Kahns hired Byrd and his firm, Morse & Mowbray, to represent them. Shortly thereafter the parties reached a settlement, and the Kahns reneged on the settlement. Eric filed an action against the Kahns for specific enforcement of the settlement and Byrd and his firm declined to contest Eric's contentions regarding the settlement. The district court held a hearing for specific enforcement of the settlement and found that all parties believed the settlement to be the final and binding agreement between the parties. The Kahns then sued Byrd and his firm for legal malpractice, breach of fiduciary duty, negligent infliction of emotional distress, and intentional infliction of emotional distress. The district court held that the Kahns were collaterally estopped from raising their claims because the claims were already litigated in the prior litigation. Byrd and Morse & Mowbray moved for costs and attorneys fees and were awarded \$37,341.00 by the district court. The Kahns now appeal the district court's award of attorney's fees.

Disposition/Outcome

The Nevada Supreme Court found that the district court improperly granted summary judgment on the Kahn's legal malpractice claims because it did not litigate all of the issues supporting the claims. Further, the district court abused its discretion in awarding attorney's fees. Nevertheless, the district court properly granted summary judgment on the Kahns' infliction of emotional distress claim because they failed to establish a prima facie case for the claim and such claim is improper when based upon a legal malpractice claim.

Factual and Procedural History

Christine Kahn and the Kahn Family Trust (the "Kahns") hired Christopher Byrd and his firm, Morse & Mowbray to represent them in a lawsuit involving the sale of their business, A-1 Equipment Rental, Inc., to their son Frank Kahn in violation of an agreement they had with another son, Eric Kahn. Due to the Kahns' ages and related health problems, Byrd filed a motion for preferential setting for trial and the trial was set for January 25, 1999. Shortly before the trial date, Byrd claimed that personal reasons prevented him from trying the case and stipulated with Eric's attorney to continue the trial until April 20, 1999.

In March of 1999, the parties met to discuss settlement and an agreement was reached wherein Eric would purchase the business and the land for a purchase price of \$700,000.00 and all claims would be released. Shortly after the settlement discussions,

¹ By Hagar Labouz

but prior to the execution of the agreement, the Kahns reneged on the settlement and raised the purchase price by \$500,000.00. Byrd and his firm declined to contest Eric's contentions regarding the settlement agreement and as a result, Lamond Mills was substituted as counsel in place of Byrd.

On June 24, 1999, the district court held an evidentiary hearing regarding specific enforcement of the agreement. The district court found that all of the parties intended the recorded settlement to be a final and binding agreement on the parties and that each of the parties agreed to the terms expressed in the agreement.

Following the judgment, the Kahns sued Byrd and Morse & Mowbray, alleging legal malpractice, breach of fiduciary duty, negligent infliction of emotional distress, and intentional infliction of emotional distress. The district court held that the Kahns were collaterally estopped from raising any claims because the claims had been litigated in the prior litigation. Byrd and Morse & Mowbray then moved for costs and attorneys' fees. The district court granted their motion and determined that they were entitled to \$37,341.00. The Kahns now appeal that decision and the appeals have been consolidated.

Discussion

The Nevada Supreme Court found that the evidentiary hearing regarding specific enforcement of the settlement agreement did not provide a full and fair opportunity to litigate the adequacy of the advice given by Byrd and Morse & Mowbray. Thus, the district court improperly granted Morse & Mowbray's motion for summary judgment on the Kahn's legal malpractice claims. However, the district court did not err in granting Morse & Mowbray's motion for summary judgment on their claims of infliction of emotional distress because the Kahns failed to allege facts sufficient to support their claim. A claim of negligent infliction of emotional distress is inappropriate in the context of a legal malpractice suit when the harm resulted from pecuniary damages even if the plaintiffs demonstrated physical symptoms. As to the district court's award of attorneys' fees, the Court held that the award was premature and an abuse of the district court's discretion because the Kahns' claims of legal malpractice, premised upon their allegations of bad advice, are not collaterally barred.

Concurring/Dissent Opinion

(Gibbons, J.) The Concurring/Dissenting opinion agrees with the majority regarding the affirmance of the district court's grant of summary judgment as to the emotional distress claims. Further, the Concurring/Dissenting opinion agrees that the award of attorney's fees was improper. However, the opinion disagrees with the majority regarding the Kahn's malpractice claims, stating that there is no genuine issue of material fact that precluded the district court from granting summary judgment under the doctrine of collateral estoppel.

Conclusion

The Nevada Supreme Court concluded that the district court improperly granted Morse & Mowbray's motion for summary judgment because the factual bases for the

legal malpractice claim were not actually and necessarily litigated in the prior lawsuit. As to the emotional distress claims, the district court did not err in granting Morse & Mowbray's motion for summary judgment because a claim for negligent infliction of emotional distress cannot be premised upon an attorney's negligence in a legal malpractice case. As to the district court's award of attorney's fees, the Court found that the award was premature and an abuse of discretion.