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***Mainor v. Nault*, 120 Nev. Adv. Rep. 84, 101 P.3d 308 (Nev. 2004)¹**

LEGAL MALPRACTICE

Summary

Appeal from the Eighth Judicial District Court's entry of final judgment pursuant to a jury verdict against attorneys Mainor and Harris. Respondents and cross-appellants Philip Nault and Wendy Nault, as co-guardians of the person and estate of Jason Nault, cross-appeal from a Eighth Judicial District Court's order offsetting the final judgment by \$400,000 from a prior settlement with another attorney involved in the underlying case.²

Disposition/Outcome

Reversed. The Supreme Court of Nevada held that: 1) the district court order approving the medical malpractice case was voidable but ratified by conduct; 2) the parents were precluded from bringing legal malpractice action on the grounds that wife was unjustly enriched in medical malpractice settlement; 3) the parents were not judicially estopped from bringing legal malpractice action; 4) the attorneys' alleged violation of ethics rules did not create a cause of action; 5) the incompetent son was entitled to be present during jury selection in legal malpractice trial; and 6) damages evidence was insufficient to support finding of legal malpractice.

Factual and Procedural History

Jason Nault was rendered in a permanent vegetative state after anesthesia equipment failed during his hernia surgery. His pregnant wife, Louise Nault, brought a medical malpractice claim on behalf of herself and Jason. Louise sought the advice of attorney Joe Rolston, for whom she had worked as a secretary. Rolston agreed to assist Louise but advised her that, as medical malpractice was outside of his area of expertise, she should hire an attorney with experience in this area. Louise and Rolston entered into a contingency fee agreement.

After Louise and Rolston interviewed several personal injury attorneys, Louise decided to retain W. Randall Mainor and the law firm of Mainor & Harris. On June 13, 1994, Louise, Mainor and Richard A. Harris signed a contingency fee agreement, which established that Mainor and Harris would receive 33.3 percent of the gross recovery prior to suit and 40 percent after suit was filed. The agreement incorporated the previous retainer agreement with Rolston.

In March 1996, after nearly two years of contentious litigation, the parties participated in a full-day settlement conference which resulted in a settlement of approximately \$17 million. After settlement, the parties allocated the settlement to provide for Jason, his wife Louise, and their daughter. These ends were met by purchasing various annuities. The attorney fee agreements provided for fees totaling 40

¹ By Timothy J. Geswein

² *Mainor v. Nault*, 120 Nev. Adv. Rep. 84, 101 P.3d 308, 311 (Nev. 2004).

percent of the settlement, or approximately \$6.8 million. After these payments, a surplus of approximately \$2.5 million was, with everyone's agreement, given to Louise.

On April 11, 1996, Mainor petitioned the district court for approval of the compromise of Jason's claim. The petition specifically set forth the details of the annuity purchased for Jason's care. Judge Gates, who had been the trial judge in the underlying tort case, found that the compromise of the claims fair and reasonable. Accordingly, the district court approved the compromise, as well as the payment of attorney fees.

Louise's relationship with Jason's parents deteriorated after the settlement because the parents believed Louise was mismanaging Jason's estate because several checks to Jason's nurses had been returned for insufficient funds. Ultimately, Louise relinquished guardianship and the Naults released Louise from all other claims. On May 11, 1998, the Naults signed a stipulated settlement agreement, in which they acknowledged the compromise of Jason's claims in the prior tort action and Louise's acceptance of the compromise on behalf of Jason, Rene and herself. They also acknowledged that the lump sum payments and annuities had been allocated to Louise, Jason and Rene. Finally, they expressly agreed not to contest the final settlement of the tort action or any other issue relating to the \$17 million settlement. On June 9, 1998, the district court entered an order approving the settlement between Louise and the Naults.

Soon after settling with Louise, the Naults, as guardians, retained an attorney and commenced the present action against Louise, Rolston, Mainor, Harris and the law firm of Mainor & Harris. The complaint essentially alleged that the attorneys should have recognized that they had a conflict of interest by representing both Jason and Louise, that the attorneys and Louise conspired to deprive Jason of his money and that Jason received insufficient compensation in the settlement.

The Naults settled with Rolston for \$400,000. They settled with Louise for no money, in spite of the fact that they alleged that Louise had breached her fiduciary duties to her husband and conspired to obtain a larger portion of the settlement money than Jason. In the second settlement with Louise, the Naults obtained a divorce for Jason from Louise, Louise withdrew an objection she had filed to the Naults' guardianship accounting, Louise dismissed a complaint she had filed against Jason's parents and Kelly Nault to recover large amounts of money she had allegedly loaned to them and Louise renounced any claims she might have had to any money recovered in the present action.

The action proceeded to trial against Mainor and Harris. After a twelve-day trial, the jury awarded \$3.25 million to Jason's estate against Mainor and Harris. The district court's final judgment offset the jury's award by \$400,000, which reflected Rolston's settlement with the Naults. Mainor and Harris subsequently moved for a judgment notwithstanding the verdict (JNOV), or alternatively, to modify the judgment to preclude prejudgment interest. After a hearing, the district court denied the motion. Mainor and Harris appeal from the final judgment, and the Naults cross-appeal from the order applying an offset to the judgment.

Discussion

1. The district court's order approving settlement of the medical malpractice case was voidable but ratified by conduct.

Mainor and Harris assert that the district court lacked jurisdiction over the present action because the district court's settlement approval order in the medical malpractice action was valid and was never set aside, precluding the present action as an impermissible collateral attack on a final judgment. The Naults contend that the settlement approval order was void for three reasons: (1) lack of relevant material information, (2) due process violations, and (3) lack of jurisdiction.

The court dismissed the Naults' first reason by noting that the court will not disturb a district court's findings of fact if they are supported by substantial evidence and that the transcript of the settlement approval hearing satisfied the court that the district court had sufficient information to determine that Jason's needs were met.

The court dismissed the Naults' second reason by noting that procedural due process is violated when the adjudicator, not the guardian, has a conflict of interest. In this case, there is no evidence that the district court was biased toward any party. Further, even if Louise's guardianship of Jason created a conflict of interest, there was no evidence at the settlement approval hearing that Jason's needs would not be fully met by the settlement agreement. The substantive due process claim lacks merit because substantive due process concerns the adequacy of the government's reason for depriving a person of life, liberty or property. It is not meant to protect against alleged fraud upon the court by private individuals.

The court dismissed the Naults' final reason by noting that the family court has exclusive jurisdiction over guardianships and that the guardian of the ward's estate must seek the family court's approval before agreeing to a settlement on behalf of the ward. Hence, at first blush, it appears that the district court lacked subject matter jurisdiction to approve the settlement with respect to Jason. However, when there is a colorable case for jurisdiction, a district court order is merely voidable rather than void. Here, because the district court had jurisdiction to try to judgment the underlying medical malpractice case and to enter a judgment based upon the verdict, the court must have reasonably believed that it could finalize the global settlement agreed to by all of the parties. No one objected to the district court's finding that the settlement was fair and reasonable. Moreover, orders of the district court are presumptively valid if regular on their face. On its face, the district court's order appears to be a regular settlement approval order. Hence, the order was voidable, but not void.

The Naults, on Jason's behalf, never attempted to set aside the judgment pursuant to for fraud, lack of good faith or because the order was allegedly void. Subsequently, in the legal malpractice case, the district court determined that the district court in the medical malpractice action had subject matter jurisdiction to approve the settlement. This finding was proper because the Naults never moved to set aside the settlement approval order and did not contest the global settlement of \$17 million. We conclude that the settlement approval order was voidable, but, since the Naults never attempted to set it

aside and in fact did not contest approval of the global settlement but only the allocation to Jason, their conduct ratified the order's validity.

2. Parents are precluded from bringing legal malpractice action on the grounds that wife was unjustly enriched in medical malpractice settlement.

The Nevada Supreme Court held that the Naults were precluded from bringing a legal malpractice claim because the Naults expressly agreed not to contest the final settlement of the tort action or any other issue relating to the settlement, and that this agreement was approved by the district court. Further, the Naults approved of the settlement amount and complain only that the division of the proceeds was improper. The court holds that to permit the Naults to pursue an independent action as they have done would be unfair for two reasons. First, the Naults are accepting a portion of the settlement approval that benefits them but are bringing suit to upset the portion they now oppose without attempting to modify the settlement compromise. Second, the distribution of a large amount of the proceeds to Louise is left standing without any attempt to recoup the allegedly excessive amount paid to her. The Naults actually compounded this situation by giving a full release to Louise for what appears to be very little compensation. The net result is that the Naults are suing their attorneys for a portion of the settlement previously approved without taking any action to revise the settlement approval and recoup the amount they claim due from Louise, the party who was allegedly unjustly enriched. The Nevada Supreme Court did not believe that this is reasonable or equitable.

3. Parents are not judicially estopped from bringing legal malpractice action.

Mainor and Harris argued that the judicial estoppel doctrine precludes the legal malpractice action because the doctrine's purpose is to suppress fraud and prevent a party from changing his or her position depending on the demands of each particular case concerning the subject matter in controversy. Mainor and Harris assert that the Naults cannot pursue the legal malpractice claim because the guardianship settlement agreement the Naults submitted to the district court under oath absolved Louise of all claims relating to the medical malpractice case and guardianship.

The Nevada Supreme Court held that this argument lacked merit for three reasons. First, the protection of the judicial system from parties asserting inconsistent positions assumes that the inconsistent position was successfully asserted in a prior judicial proceeding. Because the district court or jury does not determine the facts when a settlement agreement is presented to the court, it does not constitute a judicial endorsement of a party's claims.

Second, the mere fact that the Naults knew that Mainor, Harris and Rolston were the attorneys in the medical malpractice claim did not make the attorneys a beneficiary of the settlement agreement because the settlement did not contemplate releasing the attorneys from any liability for alleged legal malpractice.

Finally, Mainor and Harris's argument that the Naults essentially sought to modify the medical malpractice settlement in their legal malpractice claim hinges on the attorneys' characterization of the Naults' claim as an attempt to redistribute the medical malpractice settlement proceeds. This characterization was wrong because a legal

malpractice claim focuses on whether the attorneys adhered to the standard of care in their representation of the case, which is different from the underlying medical malpractice claim.

4. The admission into evidence of specific ethical rules permissible but attorneys' alleged violation of ethics rules did not create a cause of action.

Mainor and Harris contend that the district court erroneously instructed the jury on specific professional rules, over their objection, because an alleged violation of the rules of professional conduct does not create a civil cause of action, as set forth in the preamble to the American Bar Association Model Rules, which may be used for guidance in applying the Nevada rules. Mainor and Harris contend that once the jury heard these rules and opinions regarding violations of the rules, it would be virtually impossible for the jury to decide the case based on the appropriate standard of whether an attorney failed to use the skill, prudence and diligence that a lawyer of ordinary skill and capacity would have used.

The Nevada Supreme Court chose to adopt the majority rule that professional rules of responsibility do not create a private right of action, but are relevant to the standard of care. Because the Nevada Supreme Court Rules reflect a professional consensus of the standards of care below which an attorney's conduct should not fall, it would be illogical to exclude evidence of the professional rules in establishing the standard of care.

5. Jason Nault was entitled to be present during jury selection in the legal malpractice trial.

The record reflects that the Naults sought to have Jason present during jury selection and closing arguments. Mainor and Harris sought to exclude Jason's presence entirely because Jason's presence created unfair prejudice. Mainor and Harris contend that Jason's presence was unhelpful to the jury's determination of the facts and was intended solely to generate tremendous sympathy for Jason and his parents and undermine Mainor and Harris's right to a fair trial. At a hearing on Mainor and Harris's motion in limine, the district court ruled that Jason would be allowed to be present during jury selection but not during closing arguments. On appeal, Mainor and Harris contend that the district court improperly denied their motion in limine seeking to exclude Jason's presence during trial.

The Nevada Supreme Court held that a party's right to be present at his trial is not absolute but rather must be balanced against the opposing party's right to an impartial jury. Where the party's presence might elicit so much sympathy from the jury that the jury would likely disregard its duties as instructed and find for the party based on sympathy alone, the opposing party's right to a fair tribunal would be violated. The Nevada Supreme Court stated that it believed that a party should be permitted to attend his or her trial, or every segment of it if the trial is bifurcated, even though that attendance is very limited. In this case, Jason's presence was limited and not unfairly prejudicial to Mainor and Harris.

6. Evidence regarding damages evidence was insufficient to support finding of legal malpractice.

Mainor and Harris assert that there was no legal or evidentiary basis for the jury's determination that Jason was entitled to a larger share of the settlement proceeds because the Naults failed to show proximate causation. Mainor and Harris contend that the evidence regarding damages was too speculative to constitute substantial evidence to support the jury's \$3.25 million verdict against them.

The Nevada Supreme Court found that the expert testimony about damages was highly speculative and lacked foundation in that it was not based on any treatise of law or on Nevada law regarding apportionment of settlement proceeds between an injured spouse and his wife. The Nevada Supreme Court found it was not unreasonable for the attorneys to rely upon the doctors' predictions regarding Jason's life expectancy in establishing the annuity to provide for his needs. Finally, Wendy Nault, Jason's mother and co-guardian, conceded that, although little was left over per month from Jason's annuity, all of Jason's needs had been met by his annuity.

The Nevada Supreme Court held that the district court erroneously admitted the speculative damages testimony and, therefore, no substantial evidence supported the jury's finding that Jason, through his guardians, met his burden of proof with regard to the damages element of his legal malpractice claim.

Conclusion

The Nevada Supreme Court held that substantial evidence did not support the damages element of the legal malpractice claim and therefore the district court's judgment was reversed.