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Summary of Greenberg Traurig, LLP v. Frias Holding Company, 130 Nev. Adv. Op. 67

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LITIGATION PRIVILEGE: ATTORNEY MISCONDUCT

Summary

The Court adopted an exception to the common law litigation privilege for legal malpractice and professional negligence actions. A client can pursue malpractice and professional negligence actions against an attorney, and support those actions with communications made in the course of litigation.

Background

In 2005, Mark James and Scott Bertzyk were opposing counsel in a commercial litigation matter. James, at the time, was an attorney at Bullivant Houser Bailey, P.C., and represented the sellers, Hotels Nevada, LLC and Inns Nevada, LLC (Hotels). Bertzyk was an attorney at Greenberg Traurig, LLP (Greenberg), and represented the buyer, L.A. Pacific Center (LAP). Prior to final resolution, James transitioned out of the litigation after becoming president and CEO of Frias Holding Company (FHC), a taxi and limousine service company.

When the matter went to arbitration, Bertzyk asserted that James had committed misconduct. According to James, before the arbitration panel issued the final award, Bertzyk suggested to Hotels's new attorneys that Hotels should explore a malpractice suit against its former attorneys, including James.

Meanwhile, James, in his new capacity as president and CEO of FHC, retained two attorneys at Greenberg for intellectual property and gaming license issues. James was aware of Greenberg's representation of LAP, but the firm did not inform James of Bertzyk's statements made during arbitration of the earlier matter. During Greenberg's representation of James, LAP filed suit against Bullivant Houser Bailey alleging attorney misconduct. Bertzyk provided a declaration that reasserted negative claims against James.

After learning of Bertzyk's actions, James and FHC (collectively, respondents) severed their relationship with Greenberg, and filed a malpractice suit against Bertzyk and Greenberg (collectively, appellants) in Nevada district court, alleging respondent's representation of LAP in a suit against James called into question Greenberg's ability to represent James and FHC. The parties removed to federal court². Appellants moved to dismiss, arguing that the litigation privilege barred respondent's claims.

The federal court denied appellants' motion without prejudice because Nevada courts had not addressed the legal-malpractice exception to the litigation privilege. Noting the silence of Nevada case law on the matter, the federal court certified this question to the Nevada Supreme Court³: "Whether Nevada law recognizes an exception to the common law litigation privilege for legal malpractice and professional negligence actions."

¹ By Tom Stewart.

² Pursuant to 28 U.S.C. §§ 1441 and 1446.

³ Pursuant to NRAP 5.

Discussion

Litigation privilege

Nevada recognized has adopted the “long standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged,” shielding those who made the communications from civil liability in tort.⁴ The “litigation privilege” provides attorneys, as officers of the court, the freedom and protection to zealously advocate for their clients. Though considered “absolute,” the Court has recognized there are limitations to the privilege. For example, it only applies to statements or communications that are “in some way pertinent” to the subject matter of the case,⁵ and does not shield an attorney from discipline by the Bar⁶.

The legal-malpractice exception to the litigation privilege

Nevada case law was silent on whether the privilege extended to communications at issue in professional negligence and/or legal-malpractice suits was a matter of first impression for the Court. Looking to outside jurisdictions for guidance, the Court noted that many states recognize that the privilege is inapplicable to a client’s claim for malpractice or negligence against their attorney.⁷ Few courts have found the privilege to bar malpractice claims.⁸

Nevada recognizes the legal-malpractice exception

The Court found the rationale behind the legal-malpractice exception to the litigation privilege convincing, and adopted the exception. The privilege is designed to allow attorneys ample freedom in the representation of clients. Shielding attorneys from reprimand, if their clients allege improper legal representation, would be contrary to the aim of the privilege itself. Therefore, it would be unsound policy to allow the privilege to shield attorneys from malpractice claims brought by their clients.

Conclusion

The Court adopted an exception to the litigation privilege in the case of legal malpractice and professional negligence actions. Communications made in the course of litigation are not absolutely privileged, and can be used to support legal malpractice and professional negligence actions by a client, against its attorney.

⁴ *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643 (2002) (quoting *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)).

⁵ *Id.* at 433, 49 P.3d at 644 (internal quotation omitted).

⁶ *Bull v. McCuskey*, 96 Nev. 706, 712, 615 P.2d 957, 962 (1980).

⁷ *Kolar v. Donahue, McIntosh & Hammerton*, 52 Cal. Rptr. 3d 712, 719 (Ct. App. 2006); *Buchanan v. Leonard*, 52 A.3d 1064, 1070 (N.J. Super. Ct. App. Div. 2012).

⁸ *See O’Neil v. Cunningham*, 173 Cal. Rptr. 422 (Ct. App. 1981) (applying a California statute to bar a client’s defamation action against his attorney); *Hugel v. Milberg, Weiss, Bershad, Hynes, & Lerach, LLP*, 175 F.3d 14, 17 (1st Cir. 1999) (applying New Hampshire Law and concluding that the litigation privilege barred “legal malpractice claims”).