

STATE OF MICHIGAN
COURT OF APPEALS

BUDDY L. JOHNSON,

Plaintiff-Appellant,

and

NANCY JOHNSON

Plaintiff,

v

JAMES K. FETT and MUTH & FETT, P.C.,

Defendants-Appellees.

And

ANDREW L. FANTA and WASHTENAW
LEGAL CENTER, P.C.

Defendants.

UNPUBLISHED

August 20, 1999

No. 207351

Washtenaw Circuit Court

LC No. 95-001861 NM

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

WHITE, J. (concurring in part and dissenting in part).

While I do not join in the majority's conflict of interest analysis, I nevertheless conclude that genuine issues of material fact remained regarding plaintiff's claims of malpractice and that a remand for further proceedings is appropriate.

The circuit court did not address plaintiff's claim that defendant Fett was professionally negligent in his representation of plaintiff in the wrongful discharge case, concluding that the representation was confined to the wrongful discharge case, and that he had no duty with respect to the bankruptcy

proceedings from which plaintiff's damages flowed.¹ I conclude that there were genuine issues regarding whether Fett's conduct breached the standard of care applicable to an attorney representing a plaintiff in a wrongful discharge case.

Plaintiff's complaint clearly alleged that Fett's representation of plaintiff in the wrongful discharge case was negligent,² and plaintiff reiterated this argument at the hearing on defendants' motion for summary disposition.³

Defendants argued in their motion below that plaintiff and Fett had no attorney-client relationship as to the bankruptcy case in that their relationship extended only to the wrongful discharge claim. In response, plaintiff argued that genuine issues of fact remained regarding whether Fett committed malpractice in his capacity as a wrongful discharge attorney by 1) recommending that plaintiff file bankruptcy and by failing to advise plaintiff that he should avoid filing bankruptcy during the pendency of the wrongful discharge case, 2) failing to advise that if plaintiff filed bankruptcy during the pendency of the wrongful discharge claim, the claim would be an asset of the bankruptcy estate to be controlled, acted on and finalized by the bankruptcy trustee, 3) failing to properly advise plaintiff of the adverse impact filing bankruptcy would have on the pending wrongful discharge claim, 4) accepting representation of the bankruptcy trustee despite an obvious conflict of interest, and 5) failing to recommend against settlement of plaintiff's claim by the trustee, which was for less than the full value of the claim. Plaintiff further argued that while Fett informed plaintiff in November that he represented the bankruptcy trustee, he failed to inform plaintiff that he no longer represented plaintiff, as he claimed; that although Fett did not represent plaintiff in the bankruptcy proceeding, he did undertake to offer advice regarding the bankruptcy and plaintiff's options with respect to regaining control of the wrongful discharge case; and that Fett negligently referred plaintiff to an incompetent bankruptcy attorney.

While plaintiff did not initially submit an expert affidavit in support of the allegations of malpractice, defendants did not assert this as a deficiency and the circuit court did not dismiss the case for failure to support the allegations. Rather, as the court stated in its denial of the motion for reconsideration, which plaintiff supported with an expert affidavit,⁴ it granted summary disposition on the basis that there was no duty with respect to the bankruptcy proceedings, a position which defendants advance on appeal.

In legal malpractice actions, a duty exists as a matter of law if there is an attorney-client relationship. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). When an attorney is retained in a cause, it becomes his or her implied duty to use and exercise reasonable skill, care discretion and judgment in the conduct and management thereof. *Id.* at 655-656.

Fett advised plaintiff within the attorney-client relationship regarding matters that affected the subject matter of the representation. That these matters also concerned a possible bankruptcy proceeding, and later actual bankruptcy proceedings in which plaintiff secured bankruptcy counsel, did not relieve Fett from the obligation to adhere to the standard of care of a wrongful discharge attorney concerning these matters, or negate his attorney-client relationship with plaintiff with respect to the wrongful discharge case.

I would remand for further proceedings consistent with this opinion.

/s/ Helene N. White

¹ The circuit court stated:

... the defendants and ... plaintiff Buddy Johnson signed an agreement for representation regarding plaintiff Buddy Johnson's wrongful discharge claim. The scope of that representation did not encompass plaintiffs filing a bankruptcy which was handled separately by a bankruptcy attorney. The bankruptcy and its incidents and effects were not the responsibility of defendant Fett but rather it was up to the bankruptcy attorney to effectively communicate the scope of the bankruptcy proceedings to the plaintiff as well as the ramifications of that proceeding.

² Plaintiff's complaint alleged that Fett "failed to exercise due care commensurate with the standard of practice for wrongful discharge and tort lawyers practicing in the Washtenaw County area" and that "as a direct and proximate result of the professional negligence and malpractice . . . Plaintiffs suffered the loss of their then pending Wrongful Discharge claim and the full or reasonable settlement value of same."

³ At the January 19, 1996 hearing on defendants' motion for summary disposition, plaintiffs' counsel argued:

I think it's imperative, your Honor, for the Court to understand that in their – in their (C)(10) motion they are saying in essence, . . . I wasn't Johnson's bankruptcy attorney and therefore I can't be liable – can't be held liable for anything relating to bankruptcy. I have set forth on pages seven and eight of my brief . . . the allegations of plaintiff's complaint which although touching on the subject of bankruptcy really go to Mr. Fett's role as Mr. Johnson's wrongful discharge attorney. Failing to keep viable if you will this very valuable wrongful discharge claim, and there's no doubt that Mr. Fett considered it to be a valuable and potentially high exposure claim. I've attached various exhibits. In one letter he [Fett] said Mr. Johnson's damages are in the neighborhood of a million dollars, and I suspect the jury's going to give it to him if they don't settle. Later in the bankruptcy court he said had the trial gone to conclusion we would have asked the jury for an award of eight hundred thousand dollars and in my estimation we feel that we would have had a seventy-five percent chance of prevailing. But what I have pointed out in my brief is allegations against Mr. Johnson and—I'm sorry, Mr. Fett, and Muth

& Fett, which although touching on the subject of bankruptcy really go to his role as the wrongful discharge attorney.

In addition, although he did not represent Mr. Johnson in his bankruptcy he did undertake to render some bankruptcy advice. An example of that is Mr. Fett's letter of November 3rd, '92 which is plaintiff's exhibit 9 . . . and defendant's exhibit B.

The letter referred to by counsel explained the mediation acceptance process and consequences, and then addressed bankruptcy issues. The letter explained the trustee's right to control the litigation and then stated:

The only way to recover your right to make decisions with regard to your lawsuit, at least as far as I know, would be to dismiss the bankruptcy proceeding. This can only be done prior to the discharge of your debts which, to my understanding, has yet to occur. I would suggest that you discuss this matter further with Mr. Fanta as I am not a specialist in bankruptcy law. However, I have talked with Mr. Fanta and in a general sense, he confirmed my understanding.

The letter went on to explain that the trustee had been cooperative to date, and Fett expected continued cooperation, but that plaintiff's and the trustee's interests might conflict if the defendant in the wrongful discharge case made an offer that would be enough to pay off plaintiff's creditors. In that case, the trustee might want to settle the case for less than the case is worth. The letter continued:

In the event that [defendant] made such an offer, you would then have to decide on a course of action. Of course, I believe your case is worth much more than \$75,000. The only way to prevent [the trustee] from accepting that offer in his effort to maximize the recovery of the creditors would be for you to dismiss the bankruptcy action.

If this is done before all of your debts are discharged, you would still be eligible to file bankruptcy again (I believe) after the trial, if necessary.

Thus, if it becomes clear that [the trustee] wishes to accept a \$75,000 settlement, you would have the option of dismissing the bankruptcy proceeding for a short period of time, which would allow us to get the trial in.

During that interim period, your creditors would be allowed to proceed against you for debts owed. However, if the trial occurs as scheduled on December 1, 1992, there would be insufficient time for them to proceed to judgment or to achieve foreclosure on your home. Then, if the suit is successful, you could simply pay off your creditors and go your merry way. On the other hand, if the suit was unsuccessful, you could then file bankruptcy again and your creditors would be barred from proceeding

against you until the bankruptcy matter is resolved. In all likelihood, all of your debts would be discharged and your creditors could not proceed against you anyway.

I emphasize that you should discuss these options with your bankruptcy attorney, Mr. Fanta, as he is the specialist in this area. I am unsure whether you have the absolute right to dismiss the bankruptcy proceeding and then to file another petition after the trial. I believe that to be the case, but I am not sure.

I hope that I have made your options clear. . . . [Emphasis added.]

Later, when the wrongful-discharge defendant offered \$85,000 and the trustee decided to accept the settlement, plaintiff did, in fact, attempt to dismiss the bankruptcy proceeding, but the bankruptcy judge approved the settlement.

⁴ Plaintiff attached an affidavit of an expert witness, Thomas Pabst, to his motion for reconsideration. Pabst's affidavit set forth his credentials and stated that he opined that the standard of care requires that a plaintiff's wrongful discharge attorney, even though he does not practice bankruptcy law, must know and understand that if a client with a pending wrongful discharge claim files a chapter seven bankruptcy, the wrongful discharge claim becomes an asset of the bankruptcy estate to be controlled and acted on by the bankruptcy trustee, and that the filing of chapter seven bankruptcy in those circumstances results in the trustee being substituted as plaintiff in the wrongful discharge case and adversely affects both the settlement value and the verdict potential of the claim. Pabst opined that Fett had been professionally negligent in the handling of plaintiff's underlying wrongful discharge claim in that he failed to so advise plaintiff and in fact advised that it might be beneficial to plaintiff's wrongful discharge case to do so because he would appear more "sympathetic" before the jury. Pabst further opined that Fett negligently and incorrectly represented to plaintiff that he could dismiss his bankruptcy petition whenever he wanted to, negligently and incorrectly advised plaintiff that he could not dismiss the bankruptcy before trial by paying his creditors in full and paying the bankruptcy costs of administration, and negligently referred plaintiff to a bankruptcy attorney who was not minimally competent to handle plaintiff's case.