Tort Law

Not Consulting Client Costs Md. Lawyer a Losing Malpractice Case

Posted Oct 15, 2008, 05:53 pm CST
By Martha Neil

Although experts said Donald Sturgill didn't have a viable medical malpractice claim for ailments he suffered after being treated and released for a boating accident, his lawyer managed to get him a $15,000 settlement.

That proved to be a costly experience for attorney Robert Joyce and his former employer, the Sudler Law Firm—but not nearly as costly as it might have been, according to the Daily Record.

Because Joyce didn't get his client's permission before accepting the $15,000 settlement, Sturgill named both as defendants in a legal malpractice suit. A Baltimore City Circuit Court found that the $15,000 settlement was more than Sturgill's alleged injuries from the claimed medical malpractice were worth, yet nonetheless determined that Joyce was negligent in accepting the settlement without consulting first with Sturgill.

"It held the lawyer responsible for $6,887.43 in medical damages, and added another $15,000 in non-economic damages," the Daily Record reports.

Sturgill had sought $1.25 million in damages in the legal malpractice case.

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Baltimore City Circuit Court: Plaintiff wins $22K in suit against

Brendan Kearney

When Donald Sturgill learned from his attorney in June 2003 that he had been offered just $15,000 to settle his medical malpractice claim against the University of Maryland Medical System Corp., he rejected the payout and eventually sued that lawyer for legal malpractice.

More than five years later, a Baltimore jury has decided his medical claim was worth less than half the hospital's offer.

Even so, the jury found Sturgill's lawyer was negligent in accepting the settlement on his behalf. It held the lawyer responsible for $6,887.43 in medical damages, and added another $15,000 in non-economic damages.

Sturgill had sought $1.25 million in his legal malpractice suit in Baltimore City Circuit Court against his former lawyer Robert E. Joyce and Joyce's former employer, The Suder Law Firm.

Because of the posture of the case, Sturgill had to establish that both his lawyer and his doctors had fallen short of the standard of care.

However, Sturgill failed to convince the jury that Sturgill's heart and nervous system ailments resulted from his treatment at R Adams Cowley Shock Trauma Center after a June 3, 2000, boating accident.

Neither Sturgill's attorney, Richard S. Lopatto III of Washington; Dennis J. Quinn, who represented the defendant law firm; nor R. Scott Krause of Eccleston & Wolf PC, which represented the defendant attorney Robert E. Joyce, returned calls for comment Wednesday.

Sturgill was fishing with a co-worker on the Susquehanna River when a torrent from a nearby dam release capsized their boat. A passing sailboat lifted Sturgill to safety, and a helicopter flew him to the emergency room in downtown Baltimore.

While multiple outside doctors who reviewed his case believe Sturgill was stable and properly released five hours after his arrival, Sturgill contended his subsequent renal failure, cardiomyopathy, and peripheral neuropathy, among other maladies, was the hospital's fault.

He shopped his case to a few attorneys before it crossed the desk of Joyce, then at The Suder Law Firm and now a solo practitioner in the South Baltimore neighborhood of Riverside.

A doctor the firm regularly used to evaluate prospective medical malpractice claims told Joyce Sturgill's claim was unsupportable, but Joyce, at Sturgill's urging, began negotiating with the hospital. Told the $15,000 offer was "firm," he accepted it -- without first obtaining Sturgill's consent.

At trial before Judge John M. Glynn, Sturgill alleged Joyce told him about the offer but not that he had accepted it in writing or that the hospital was still operating under the assumption that the claim had been settled, which led to the hospital's lawsuit against Sturgill for breaching the settlement.

Sturgill later hired Jay D. Miller of Miller, Murtha & Psoras LLC to handle his medical malpractice, then legal malpractice, claim, but ended up suing, and settling with, that firm over the lapsing of his medical claim.

**********CORRECTION**********

On Thursday, in "Plaintiff wins $22K in suit against lawyer," the litigants' trial attorneys were incorrectly identified. John Lopatto III represented the plaintiff in his suit against his former lawyer. Dennis J. Quinn represented the defendant lawyer. R. Scott Krause represented the defendant law firm.

The Daily Record regrets the error.

303 A.D.2d 561
303 A.D.2d 561, 755 N.Y.S.2d 726, 2003 N.Y. Slip Op. 12057

H

Supreme Court, Appellate Division, Second Department, New York.
MAGNACOUSTICS, INC., et al., Respondents,
v.
OSTROLENK, FABER, GERB & SOFFEN, etc., et al., Appellants.
March 17, 2003.

The Supreme Court, Nassau County, Joseph, J., denied attorneys' motion for summary judgment dismissing clients' complaint to recover damages for breach of contract and legal **malpractice**, and attorneys appealed. The Supreme Court, Appellate Division, held that attorneys did not commit legal **malpractice** by failing to **communicate** to **clients** the offer of **settlement** made by their adversary in the underlying patent infringement action.

Reversed.

West Headnotes

[1] Attorney and Client 45 ⇐105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)
To recover damages for legal malpractice, a client must prove that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, that attorney's negligence was a proximate cause of the loss sustained, that the client incurred actual damages as a direct result of the attorney's actions or inaction, and that but for the attorney's negligence, client would have prevailed in the underlying action or would not have sustained any damages.

[2] Attorney and Client 45 ⇐112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases
Attorneys did not commit legal **malpractice** by failing to **communicate** to **clients** the offer of **settlement** made by their adversary in the underlying patent infringement action; clients failed to demonstrate that, but for the attorneys' alleged negligence, they would have accepted the offer of **settlement** and would not have sustained any damages.

[3] Attorney and Client 45 ⇐129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and Evidence. Most Cited Cases
Breach of contract claims against attorneys were duplicative of clients' legal malpractice claims as there was no evidence of any promise by attorneys to obtain a specific result in the underlying patent infringement action.

****727** Wilson, Elser, Moskowitz, Edelman & Dicker, New York, N.Y. (Brett A. Scher and Thomas A. Leghorn of counsel), for appellants.
Blodnick, Gordon, Fletcher & Sibell, P.C., Westbury, N.Y. (Edward K. Blodnick and Robert D. Goldaber of counsel), for respondents.

DAVID S. RITTER, J.P., FRED T. SANTUCCI, SANDRA J. FEUERSTEIN and ROBERT W. SCHMIDT, JJ.

***561** In an action to recover damages for breach of contract and legal malpractice, the defendants appeal from so much of an order of the Supreme Court, Nassau County (Joseph, J.), entered May 2, 2002, as denied that branch of their motion which was for summary judgment dismissing the complaint.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the motion which was for summary judgment dismissing the complaint is granted, and the complaint dismissed.

The plaintiffs retained the defendants to represent them in a patent infringement action related to the plaintiffs' patent for a non-magnetic musical sound system that could be operated within close proximity of a magnetic resonance imaging system. Several months before the trial of the underlying action was scheduled to begin, the plaintiffs' adversary made an offer of settlement to the plaintiffs. The offer of settlement was never accepted and the case proceeded to trial. At the conclusion of trial, the jury found against the plaintiffs and a judgment was entered invalidating their patent. Thereafter, another attorney was substituted for the defendants as counsel for the plaintiffs. The underlying matter was ultimately settled.

The plaintiffs commenced the instant action against the defendants, alleging, *inter alia,* that the defendants committed ***562** malpractice by failing to communicate to them the offer of settlement made by their adversary in the underlying action. The defendants subsequently moved, *inter alia,* for summary judgment seeking to dismiss the complaint. The Supreme Court denied that branch of the defendants' motion. We reverse.

[1][2] To recover damages for legal malpractice, a plaintiff must prove that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community (*see Ashton v. Scotman,* 260 A.D.2d 332, 686 N.Y.S.2d 322; *Saferstein v. Klein,* 250 A.D.2d 831, 672 N.Y.S.2d 799). In addition, the plaintiff must establish that the attorney's negligence was a proximate cause of the loss sustained, that the plaintiff incurred actual damages as a direct result of the attorney's actions or inaction, and that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action or would not have sustained any damages (*Ashton v. Scotman,* supra; *Saferstein v. Klein,* supra). Here, the plaintiffs failed to demonstrate that, but for the defendants' alleged negligence, they would have accepted the offer of settlement and would not have sustained any damages. Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the plaintiffs' malpractice claim based upon the defendants' alleged failure to disclose the offer of settlement (*see Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins,* 286 A.D.2d 314, 315-316, 728 N.Y.S.2d 770).

Further, the Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing the plaintiffs' remaining malpractice claims. Upon the defendants'****728** prima facie showing that the plaintiffs failed to prove at least one of the three essential elements of a malpractice action (*see Ostriker v. Taylor, Atkins & Ostrow,* 258 A.D.2d 572, 685 N.Y.S.2d 470), the plaintiffs failed to raise a triable issue of fact (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572). In any event, these claims amounted to nothing more than the plaintiffs' dissatisfaction with the defendants' strategic choices, and thus, do not support a malpractice claim as a matter of law (*see Bernstein v. Oppenheim & Co.,* 160 A.D.2d 428, 431, 554 N.Y.S.2d 487; see also *Iannacone v. Weidman,* 273 A.D.2d 275, 708 N.Y.S.2d 723).

[3] Finally, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the plaintiffs' breach of contract claims as duplicative of their malpractice claims, as there was no evidence of any promise by the defendants to obtain a specific result (*see **563** Kaplan v. Sachs,* 224 A.D.2d 666, 639 N.Y.S.2d 69).

N.Y.A.D. 2 Dept.,2003.
Magnacoustics, Inc. v. Ostrolenk, Faber, Gerb & Soffen
303 A.D.2d 561, 755 N.Y.S.2d 726, 2003 N.Y. Slip

Op. 12057

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Westlaw
502 N.W.2d 288
502 N.W.2d 288

C

Court of Appeals of Iowa.
A.C. BENTON, Maynard Plagge, Benton-Plagge Implement, An Iowa Partnership, and Benton-Plagge Farms, Inc., An Iowa Corporation, Plaintiffs-Appellants,
v.
David M. NELSEN, Defendant-Appellee.
No. 92-538.

May 4, 1993.

In legal malpractice action, the District Court for Cerro Gordo County, Timothy J. Finn, J., granted summary judgment for attorney, and clients appealed. The Court of Appeals, Sackett, J., held that evidence did not support finding that attorney's alleged negligence was proximate cause of clients' damage.

Affirmed.

West Headnotes

[1] Attorney and Client 45 ⇐129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and Evidence. Most Cited Cases
Expert testimony that attorney's conduct is negligent is necessary unless proof is so clear that trial court can rule as matter of law that professional failed to meet applicable standard or conduct claimed to be negligent is so clear it can be recognized or inferred by person who is not an attorney.

[2] Attorney and Client 45 ⇐129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and Evidence. Most Cited Cases
To establish prima facie claim of legal malpractice, plaintiff must introduce substantial evidence that shows existence of attorney-client relationship giving rise to duty; attorney, either by act or failure to act, violated or breached that duty; attorney's breach of duty proximately caused injury to client; and client sustained actual injury, loss or damage.

[3] Attorney and Client 45 ⇐105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)
To recover for legal malpractice, plaintiff must show that, but for attorney's negligence, plaintiff would not have suffered a loss.

[4] Attorney and Client 45 ⇐129(4)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(4) k. Damages and Costs. Most Cited Cases
General measure of damages for legal malpractice is amount of loss actually sustained as proximate result of attorney's conduct.

[5] Appeal and Error 30 ⇐856(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k856 Grounds for Sustaining Decision Not Considered
30k856(1) k. In General. Most

Cited Cases
Court of Appeals is bound to affirm trial court for any reason whether argued or not.

[6] Attorney and Client 45 ⚖129(4)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(4) k. Damages and Costs. Most Cited Cases
To show actual damage, client alleging legal malpractice must present evidence that would show client would have obtained superior result.

[7] Attorney and Client 45 ⚖109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases
Even if attorney did not **communicate** contents of **client's** creditor's proposal to client, attorney was not guilty of **malpractice**, absent evidence that creditor would have agreed to **settlement** that reduced client's financial obligation or that creditor could comply with extensive provisions of the agreement.

***289** Lawrence L. Marcucci of Higgs, Fletcher & Mack, San Diego, CA, for appellants.
Stephen R. Eckley of Duncan, Jones, Riley & Finley, P.C., Des Moines, for appellee.

Heard by OXBERGER, C.J., and DONIELSON and SACKETT, JJ.

SACKETT, Judge.
Plaintiffs-appellants A.C. Benton, Maynard Plagge, Benton-Plagge Implement, an Iowa Partnership, and Benton-Plagge Farms, Inc., an Iowa Corporation, appeal a trial court ruling granting summary judgment and dismissing their legal malpractice action against defendant-appellee David M. Nelsen. Plaintiffs contend the trial court erred (1) in requiring expert testimony that defendant's conduct fell below what is expected of an attorney, (2) in not finding defendant negligent as a matter of law, (3) in finding plaintiffs were estopped from bringing the action, and (4) in ruling Benton-Plagge Implement and Benton-Plagge Farms were not proper parties to the action. We affirm.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R.Civ.P. 237(c); *see Farm Bureau Mut. Ins. Co. v. Milne,* 424 N.W.2d 422, 423 (Iowa 1988). Defendant, the moving party here, has the burden to show the nonexistence of a material fact. *Milne,* 424 N.W.2d at 423. The evidence is viewed in the light most favorable to the plaintiffs, *Thorp Credit, Inc. v. Gott,* 387 N.W.2d 342, 343 (Iowa 1986), and every legitimate inference that reasonably can be deduced from the evidence should be afforded the plaintiffs. *Id.; Sherwood v. Nissen,* 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne,* 424 N.W.2d at 423; *Gott,* 387 N.W.2d at 343.

Plaintiff A.C. Benton dealt in farm implements and owned farmland and bank stock. In about 1985, he experienced financial difficulties. He had a number of substantial creditors. Benton consulted attorney Nelsen who ultimately filed a bankruptcy petition for Benton. The bankruptcy was dismissed after agreed payments were made to creditors.

This action filed in January 1990 centers on Nelsen's alleged failure to notify A.C. Benton of a memorandum of understanding Nelsen received from Hawkeye Bank, one of A.C. Benton's largest creditors. The memorandum was received on February 11, 1986. Benton did not file bankruptcy until after February 1986.

The trial court found summary judgment was appropriate because (1) expert testimony was required to prove plaintiffs' claims, (2) Nelsen was not negligent as a matter of law since he notified Fred Hepler of the memorandum and Hepler had a plenary power of attorney for Benton, (3) the plaintiffs were equitably estopped due to Benton's failure to notify the bankruptcy trustee of the cause of action, and (4) the partnership and the corporation were not proper parties to the action.

The following facts are not disputed. A.C. Benton had been negotiating with Hawkeye Bank to restructure a personal debt to Hawkeye of over $4,000,000 and a debt owed Hawkeye by Benton-Plagge Implement of over $500,000. Additionally, Benton had a number of other creditors. In early February 1986, following a meeting with Hawkeye Bank officials, Benton came to Nelsen with a handwritten proposal concerning restructure of the debt. Nelsen was not able to understand the handwritten document and on February 5, wrote Hawkeye's attorney asking for a typewritten proposal. On February 11, 1986, Nelsen received in his office in Mason City, Iowa, a typewritten memorandum from Hawkeye Bank with a letter advising if the ***290** Bentons [FN1] desired to settle on the basis of the memorandum, the Bentons had to execute the same on or before Wednesday, February 12, 1986. On February 11, 1986, A.C. Benton was in Arizona.

> FN1. The memorandum called for the signatures of A.C. Benton and Neva C. Benton. Neva C. Benton is not a party to the litigation.

As to what happened next, the record is in dispute. Nelsen contends he contacted Fred Hepler. Hepler had a power of attorney for A.C. Benton and was his business manager. The extent of the power of attorney and Hepler's authority to act for Benton in this matter were disputed. Benton claimed Nelsen knew he always made his own business decisions. Nelsen said he told Hepler he had the documents and that they were important and contained deadlines. Nelsen also said Hepler picked up a copy of the letter and memorandum from him on the morning of February 12. Nelsen contends Hepler said he knew how to reach Benton and would notify him of the proposal.

Benton said neither Nelsen or Hepler notified him of the proposal. Hepler said he did not remember getting the proposal but, if he did, he would have communicated it to Benton.

There is also a factual dispute over whether Nelsen knew of Benton's whereabouts on February 11 and 12. Nelsen admitted Benton called him in the afternoon of February 12, and they "discussed the letter but not the contents". In deposition Nelsen was asked:

Q. By the time you talked to Mr. Benton, were you aware as to whether or not he had in fact talked to Mr. Hepler about the February 10 letter of 1986? A. I don't know.

Benton said during the call Nelsen did not talk to him about the letter and memorandum.

The facts, contrary to the trial court's ruling, do create a factual issue as to the steps Nelsen took on receiving the materials from Hawkeye Bank and on whether Nelsen contacted Hepler about the materials.

The next question is whether, considering the facts in the light most favorable to plaintiffs, there is substantial evidence to support a finding Nelsen was negligent. The trial court, also, found plaintiffs' claim failed because there was no expert testimony Nelsen's conduct fell below that expected of an attorney.

[1] Expert testimony that an attorney's conduct is negligent is necessary unless proof is so clear a trial court can rule as a matter of law that the professional failed to meet an applicable standard or the conduct claimed to be negligent is so clear it can be recognized or inferred by a person who is not an attorney. *See Martinson Mfg. Co. v. Seery,* 351 N.W.2d 772, 775 (Iowa 1984); *Baker v. Beal,* 225

N.W.2d 106, 112 (Iowa 1975); *Koeller v. Reynolds,* 344 N.W.2d 556, 561 (Iowa App.1983).

Plaintiffs were precluded from introducing expert testimony Nelsen was negligent. Iowa Code section 668.11 required plaintiffs to file a designation of expert witnesses within 180 days of defendant's answer. Plaintiffs failed to file the required designation, failed to timely answer defendant's interrogatories seeking names of experts, and made no application to extend the time for designation of experts until after it had expired. When plaintiffs filed an application to extend the deadline for designating experts, the trial court found they should not be allowed additional time. We, therefore, look at the evidence in the light most favorable to plaintiffs to see whether Nelsen's negligence is so clear it can be recognized or inferred by a person who is not an attorney. *Martinson Mfg.,* 351 N.W.2d at 775.

There is evidence Nelsen did not mention or communicate the contents of the letter and memorandum he received on February 11, to A.C. Benton when talking to Benton on February 12. There is also evidence Hepler did not remember getting the memorandum and, if he had, he would have given it to Benton. This testimony, coupled with Benton's testimony he did not ***291** know about the letter and memorandum until two years later, could support an inference, if believed, that Nelsen did not communicate to either Hepler or Benton the contents of the letter and memorandum and that Nelsen received the communication and it contained deadlines.

If Benton's version of the facts were believed and Nelsen did not communicate the contents of the memorandum and the deadline when Nelsen talked to him on February 12, we agree with plaintiffs that the negligence would be so clear that expert testimony would not be necessary. *See Baker,* 225 N.W.2d at 112 [FN2] .

> FN2. We do agree with the trial court that if the fact finder determined Nelsen had given the papers to Hepler, expert testimony would be necessary to establish this was negligence.

[2] However, our inquiry does not end here. To establish a prima facie claim of legal malpractice, plaintiffs must introduce substantial evidence that shows (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to his or her client, and (4) the client sustained actual injury, loss, or damage. *Dessel v. Dessel,* 431 N.W.2d 359, 361 (Iowa 1988).

[3][4] Plaintiffs have the obligation to show proof of damage proximately caused by defendant's negligence. *See Whiteaker v. State,* 382 N.W.2d 112, 114 (Iowa 1986). To recover, plaintiffs must show, but for the attorney's negligence, they would not have suffered a loss. *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg,* 428 N.W.2d 288, 290 (Iowa 1988); *Burke v. Roberson,* 417 N.W.2d 209, 211 (Iowa 1987). In a legal malpractice action, the general measure of damages is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Dessel,* 431 N.W.2d at 362; *Pickens, Barnes & Abernathy v. Heasley,* 328 N.W.2d 524, 525 (Iowa 1983).

[5] In moving for summary judgment, defendant also advanced there was no evidence his negligence caused plaintiffs' damage. Plaintiffs did not respond directly to this contention in their resistance. The trial court found it unnecessary to address this issue. Defendant urges in his brief that this is another ground for affirmance. Plaintiffs have not addressed the issue in their reply brief. We are bound to affirm the trial court for any reason whether argued or not. *See State v. Vincik,* 436 N.W.2d 350, 354 (Iowa 1989). We, therefore, look to whether there is substantial evidence Nelsen's conduct was a proximate cause of damaging plaintiffs.

[6][7] To show they were damaged, plaintiffs must

present evidence that would show they would have obtained a superior result. *Shannon v. Hearity,* 487 N.W.2d 690, 692 (Iowa App.1992). To show they would have obtained a result superior to the result they obtained, plaintiffs must present evidence showing the difference between the result they would have realized had they been notified of the letter and their situation following their settlement with creditors through the bankruptcy. *See Burke,* 417 N.W.2d at 212.

On February 27, 1991, plaintiffs answered an interrogatory asking to itemize all damages claimed as a result of the allegations in the petition as follows:

At this time plaintiffs are unable to answer this interrogatory. Plaintiffs will supplement this answer.

On January 13, 1992, when defendant's motion for summary judgment was filed, the answer still had not been supplemented [FN3].

> FN3. Plaintiffs' lawsuit was filed January 9, 1990. On March 26, 1990, defendant served interrogatories seeking to have plaintiffs itemize their damages. The March 26, 1990 interrogatories were not answered until February 23, 1991, at which time plaintiffs could not itemize damages and as of April 6, 1992, the last docket entry in the trial court, the answer had not been supplemented.

Benton states in his affidavit if he had known of the memorandum, he would have signed it and it would have reduced the amount owed to Hawkeye Bank by some $1,400,000 and this settlement would have ***292** reduced his personal obligations as well as the obligations of the partnership.

The memorandum was very complicated and contained substantial requirements for Benton, including the restructuring of debt, the assignment of stock in the Lone Rock Bank, the payment of monies from the sale of crops, and the transfer of contracts receivable of Benton and Plagge. Benton was further required to represent the equity in certain contracts was $673,000. Further, A.C. Benton and Neva Benton were to obtain a one-half interest, that they did not own in a contract and deliver the contract to Hawkeye. The memorandum required principal payments of $6500 a month on a new $2,000,000 note with interest payable at nine percent. The note was to balloon in 1991. Bentons were required to execute a second note for $1,000,000 and make principal payments of $30,000 annually with interest payable at eight percent. That note was to balloon in 1991. The notes were to be secured by a number of assets.

Defendant contends plaintiffs have not shown the agreement would have been signed by Hawkeye. There was evidence Hawkeye would not have signed the agreement. There was no showing Hawkeye would have signed the agreement. The depositions raise the question of whether the memorandum was intended to reduce Benton's indebtedness to Hawkeye.

There is no evidence Benton could comply with the extensive provisions of the agreement. There is no evidence Hawkeye would have agreed to a settlement that reduced Benton's financial obligation to Hawkeye. Reviewing all available evidence in the light most favorable to plaintiffs, we find they have failed to show substantial evidence to support a finding Nelsen's negligence, if any, was a proximate cause of their being damaged.

There is no evidence to allow a fact finder to infer Hawkeye would have agreed to the terms of the memorandum or that it would have reduced Benton's financial obligation to Hawkeye. There is no evidence Benton could have complied with the numerous and substantial obligations the memorandum required. *See Blackhawk,* 428 N.W.2d at 291.

We affirm the trial court's decision. Plaintiffs have failed to show there is a material issue of fact on the question of proximate cause.

This holding is dispositive of the other claims plaintiffs raised on appeal.

AFFIRMED.

Iowa App.,1993.
Benton v. Nelsen
502 N.W.2d 288

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--- S.W.3d ----
--- S.W.3d ----, 2008 WL 4691793 (Ky.)

Supreme Court of Kentucky.
Shirley A. CUNNINGHAM, Jr., Movant
v.
KENTUCKY BAR ASSOCIATION, Respondent.
No. 2008-SC-000630-KB.

Oct. 23, 2008.

Background: In an attorney disciplinary proceeding, the attorney brought a motion to withdraw from membership in the Kentucky Bar Association (KBA) under terms of permanent disbarment.

Holding: The Supreme Court held that in light of serious nature of charges of professional misconduct relating to attorney's role as counsel for some plaintiffs in class action suit against diet-drug manufacturer, attorney's motion would be granted.
Motion granted.

West Headnotes

Attorney and Client 45 ⇐59.12

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.12 k. Resignation; Voluntary Surrender of License. Most Cited Cases
Kentucky Supreme Court would grant attorney's motion to withdraw his membership in Kentucky Bar Association (KBA) under terms of permanent disbarment, where attorney had been charged with professional misconduct as counsel for some plaintiffs in class action suit against diet-drug manufacturer, which charges included failing to **communicate** with **clients** regarding amount of total **settlement**, regarding process for determining amount each plaintiff would receive, and regarding options available to clients if they rejected their **settlement** amounts, receiving excessive fees by collecting not only contingency fees but also additional fees from total **settlement** proceeds, engaging in improper fee-splitting with attorneys and non-lawyers, failing to explain to clients the conflicts of interest regarding the clients competing with each other for **settlement** funds and regarding the attorney's interest in collecting fees from **settlement** fund beyond the contingency fee, using **settlement** funds for attorney's personal purposes, failing to supervise non-lawyer employees, and making false statements to tribunal. Sup.Ct.Rules, Rules 3.480, 3.130, Rules of Prof.Conduct, Rules 1.4(a, b), 1.5, 1.7, 1.8, 1.15, 2.1, 3.3(a)(1), 5.3(a, b), 5.4(a), 5.5(b).

OPINION AND ORDER

JOHN D. MINTON JR., Chief Justice.
*1 The Movant, Shirley A. Cunningham, Jr., KBA Member Number 16220, 3101 Richmond Road, Suite 304, Lexington, Kentucky 40509, moves this Court to withdraw his membership to the Kentucky Bar under terms of permanent disbarment. Pursuant to SCR 3.480, Movant admits that his conduct in the case, *Darla Guard, et. al. or Jonetta Moore, et. al. v. A.H. Robins Company, et. al.*[FN1] (hereinafter the Fen-Phen case), violated certain Supreme Court Rules as charged in KBA File 9339. For the reasons set forth herein, we grant Movant's motion.

The charges against Movant stem from a class action lawsuit filed against American Home Products (AHP) in the Boone Circuit Court in July 1998, on behalf of several plaintiffs who claimed to have been injured by AHP's diet drug, Fen-Phen. All of the plaintiffs Movant represented entered into contingency fee contracts with him. A settlement agreement was reached in May 2001 between the

plaintiffs and AHP resulting in one lump sum payment to be divided among all plaintiffs. The agreement also provided that a portion of the settlement would be paid to Movant and two other attorneys, William Gallion and Melbourne Mills, Jr., who were affiliated with the case. The agreement allowed Movant, Gallion, and Mills to divide the settlement amount between plaintiffs at their discretion and also determine how much they were to be paid. The total amount of settlement funds to be distributed was $200,450,000.

A staff member working with Movant, Gallion, or Mills contacted each of the plaintiffs and informed them how much settlement money he would receive. The plaintiffs were never informed that their lawyers actually determined the amount of money they were to be given. If a plaintiff complained about the settlement amount, he was coerced by the attorneys or their staff to take the amount offered under the guise that it was what AHP had specifically offered them. A confidentiality agreement was signed by each plaintiff and some plaintiffs were even told that they could go to jail if they discussed the terms of their individual settlement. At no point were the plaintiffs told about the total settlement arrangement from AHP. No plaintiff received a notice of the settlement process, the manner in which their settlement amounts were decided upon, or their right to opt out of the settlement and proceed to trial. Additionally, Movant previously entered into an agreement with attorney Stanley Chesley to share fees received from the case. Movant also agreed to pay fees directly from the settlement proceeds to David Helmers and Richard Lawrence. The plaintiffs were never informed of this fee-splitting arrangement.

In June 2002, nearly $70 million of the settlement funds had not yet been distributed. The money was improperly stored in the personal accounts of the attorneys. An order was entered by Judge Bamberger of the Boone Circuit Court to give fifty percent of the remaining funds to the plaintiffs, and fifty percent to Movant, Gallion, Mills, and several other attorneys for "indemnification or contingent liabilities." The record shows that there were no "contingent liabilities."

*2 In July 2002, another order was issued by the Boone Circuit Court. This divided any remaining funds between the attorneys for "outstanding litigation and administrative expenses" and a charitable organization which was to be created. No statement exists showing what outstanding litigation or administrative expenses existed at that time. The July 2002 order implied that all plaintiffs had consented to the creation of the charity. However, the record clearly shows that the plaintiffs did not knowingly consent to the creation of a non-profit charity like the one being proposed.

In January 2003, The Kentucky Fund for Healthy Living, Inc., was registered with the Secretary of State as a 501(c)(3) corporation. Movant, Gallion, and Mills transferred $20 million of the remaining settlement from their own personal accounts in order to fund the entity. Movant was paid a salary for serving as one of the charity's board members.

In total, the attorneys received approximately $104,337,000 from the total settlement. Movant received fees in excess of approximately $50 million.

From these acts, Movant is charged with twenty-two violations of our Supreme Court Rules. These charges are:

1) The Movant violated SCR 3.130-1.4(a) by failing to adequately communicate with the plaintiffs that he represented in the Fen-Phen case, including but not limited to his failure to ever personally communicate with most of his clients in that case.

2) The Movant violated SCR 3.130-1.4(b) by failing to inform his clients in the Fen-Phen case of relevant information, including but not limited to: the failure to communicate the amount of the total **settlement** from AHP to his clients; the failure to explain to his clients the process for de-

termining the amount that each of the Plaintiffs would receive; the failure to inform his clients of the options available in the event that the **settlement** amount for that individual client was rejected by the client; by never personally **communicating** with his **clients** about the case; and by instructing or allowing others to give his clients inaccurate information about multiple aspects of the case.

3) The Movant violated SCR 3.130-1.5(a) by receiving an excessive fee in the Fen-Phen case, by receiving both a contingency fee from each of his clients who were plaintiffs in the lawsuit and additional fees from the total **settlement** proceeds.

4) The Movant violated SCR 3.130-1.5(c) by failing to provide his clients with a written statement explaining the outcome of the matter, by failing to provide each of his clients with an accounting stating how the client's **settlement**, the attorney fee, and reimbursement for costs were calculated, and by providing incorrect information as to the method of determination of the client's portion of the statement.

5) The Movant violated SCR 3.130-1.5(e) by dividing fees with other lawyers not in proportion to their services performed, nor pursuant to a proper agreement, and by failing to disclose to his clients that he divided fees with Gallion, Mills, Chesley, Helmers, and Lawrence; by failing to gain the approval of his clients for splitting fees with other attorneys not in his law firm; and because the totality of the fees paid to the Respondent, Gallion, Mills, Chesley, Helmers, and Lawrence was unreasonable.

*3 6) The Movant violated SCR 3.130-1.7(a) when in representing multiple clients who were competing for the same **settlement** funds he failed to explain the ramifications of the multiple client representation to his clients, and by failing to obtain his clients' consent in the multiple representation.

7) The Movant violated SCR 3.130-1.7(b) by accepting a lump sum **settlement** from AHP, assisting in allocating less than one-half of the **settlement** funds to the clients, and then receiving an excessive fee for himself and those under his control from the remainder of the **settlement** proceeds. This method of determining the individual **settlement** amounts of his clients while having a stake in retaining a large amount of the **settlement** funds for his own attorney fees or contractual obligations of fee-splitting with non-lawyers and other lawyers, violates SCR 3.130-1.7(b). In addition, the Movant failed to obtain consent of multiple clients in a single matter or to include any explanation of the implications of such an arrangement in the division of the money.

8) The Movant violated SCR 3.130-1.8(a) by acquiring an interest in the **settlement** funds beyond his written fee agreement. The Movant's interest in the **settlement** funds was created when he accepted a lump sum **settlement** to be divided between his clients, the other plaintiffs, the other attorneys, and the lay persons with whom he would split fees, in order to receive a fee in excess of the amount stated in the contingency fee contracts with his clients.

9) The Movant violated SCR 3.130-1.8(g) as referenced above, including but not limited to, his actions: in failing to explain to his clients that AHP made a lump sum **settlement** to all of the plaintiffs and the total amount thereof; in failing to explain that the **settlement** agreement stated that the plaintiffs' attorneys would determine the amount that each plaintiff would receive from the lump sum **settlement**; in failing to disclose or explain the proposed allocations in the **settlement** agreement; in failing to communicate the amount of the total **settlement** from AHP to his clients and to the plaintiffs in the overall lawsuit; in failing to consult with his clients at all; or in failing to obtain the consent of his clients to make an aggregate **settlement**.

10) The Movant violated SCR 3.130-1.8(j) by ac-

quiring a proprietary interest in the litigation. The Movant's interest in the litigation was created when he accepted a lump sum **settlement** to be divided between his clients, the other plaintiffs, the attorneys, and the lay persons with whom he had agreed to split fees, all with the knowledge that he would receive a fee in excess of the amount stated in the contingency fee contracts with his clients.

11) The Movant violated SCR 3.130-1.15(a) by co-mingling his property with that of his clients, by using those funds for personal use, and by moving, or participating in moving funds belonging to clients out of the state.

12) The Movant violated SCR 3.130-1.15(b) by failing to turn over the clients' funds to which they were entitled, and by failing to provide an accurate accounting of the distribution of the total **settlement** received from AHP as well as the individual clients' **settlement** distribution.

*4 13) The Movant violated SCR 3.130-1.15(c) by removing funds that did not belong to the Respondent, re-depositing the funds in a personal account, and later transferring personal funds back to the original account to cover second client distributions, and initially, upon receipt of the funds, by failing to make the proper accounting to his client before withdrawing funds for him- self.

14) The Movant violated SCR 3.130-2.1 by failing to exercise independent professional judgment in distributing the lump sum **settlement** from AHP or by failing to render any candid advice to his clients during the representation, including whether to accept the proposal the attorneys made.

15) The Movant violated SCR 3.130-5.3(a) by failing to have in effect policies and procedures to ensure that his non-lawyer employees were acting in accordance with the lawyer's ethical duties in their dealings with the clients and discussions about **settlement** matters

16) The Movant violated SCR 3.130-5.3(b) by failing to appropriately supervise his non-lawyer employees in order to ensure that their conduct was compatible with his ethical duties in their dealings with the clients and discussions about **settlement** matters

17) The Movant violated SCR 3.130-5.4(a) by paying a percentage of legal fees to non-lawyers, including but not limited to staff members in his law firm, trial consultants, and a mediator

18) The Movant violated SCR 3.130-5.5(b) by assisting and permitting non-lawyers in his employ and that of the other counsel to give legal advice to his clients with regard to their litigation and the acceptance of proposed **settlements**

19) The Movant violated SCR 3.130-8.3(a) by violating the Rules of Professional Conduct and by knowingly assisting the other plaintiffs' lawyers, non-lawyers working for the plaintiffs' lawyers, and the Boone Circuit Judge to violate the Rules of Professional Conduct

20) The Movant violated SCR 3.130-8.3(c) as described above, including, but not limited to, his actions: in deceiving his clients into accepting the individual **settlement** amounts; in deceiving clients about their claims even after demand for more specific accounting; in misrepresenting to the Boone Circuit Court that his clients had agreed to donate a substantial portion of the total **settlement** received from AHP to charity; in failing to inform the Boone Circuit Court that he had contingent fee contracts with all of his clients which set a specific fee; and in providing, or assisting in providing, false or misleading information to the Boone Circuit Court about the fees and expenses, as well as the manner in which the **settlement** had been reached by each of his clients, and in misappropriating funds over and above his fee contracts

21) The Movant violated SCR 3.130-3.3(a)(1) by advising the Boone Circuit Court that his clients had agreed to donate millions of dollars to a charitable organization, when in fact some of the Respondent's clients were not informed of the possibility that a portion of the **settlement** proceeds may be donated to charity, some clients were informed that a nominal amount may be donated to charity, and others objected to the donation of any amount of the **settlement** to charity. Further, the Movant advised, or participated in advising, the Boone Circuit Court of false statements of fact relative to the method of dividing the **settlement** among the client and the lawyers, and the application of the fee contracts to that division.

***5** 22) The Movant violated SCR 3.130-5.3(c) by directing and ratifying the conduct of his employees, including Walter Overstreet, and by failing to engage in remedial acts.

The Movant now moves to withdraw his membership from the Kentucky Bar and to terminate the disciplinary proceedings against him. Movant admits that "his conduct violated certain Rules of the Kentucky Supreme Court as charged by the Inquiry Commission."In particular he admits that:

(1) he did not tell his clients in writing that he had made fee arrangements with other attorneys; (2) he did not advise his clients concerning the mediation of their case, or provide them an opportunity to be present at the mediation or present input as to the value of their specific case; (3) he did not advise his clients of the total settlement amount and did not comply with the requirements of SCR 3.130-1.8(9); (4) he did not advise his clients that he was seeking fees that were more than the contingent fees provided in his contingent fee contracts; (5) he did not comply with the requirements of SCR 3.130-1.15 to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property ... in a separate account maintained in the state where the lawyer's office is situated ..."; (6) he did not disclose to the clients that he intended to request that the Judge consider placing approximately $20,000,000 of the settlement funds into the Kentucky Fund for Healthy Living, Inc., or obtain their consent to that distribution; (7) he participated as a paid director of that Fund without client consent; and (8) he did not disclose to his clients that their individual settlement amounts were being determined by a settlement protocol developed and administered by their own lawyers, not by the Defendant.

The KBA strongly urges this Court to sustain the motion and disbar Movant. In light of the seriousness of the charges against Movant and his admission of guilt, we grant Movant's motion.

Thus, it is ORDERED that:

1) Movant, Shirley A. Cunningham, Jr.'s motion to withdraw his membership in the Kentucky Bar Association under terms of permanent disbarment is granted. Movant thusly, may never apply for reinstatement to the Bar under the current rules;

2) Movant in accordance with SCR 3.390, shall notify all Courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar matters, of his inability to continue representation;

3) Movant shall immediately cancel and cease any advertising activities in accordance with SCR 3.390;

4) All current bar disciplinary proceedings against Movant are hereby terminated;

5) In accordance with SCR 3.450, Movant is directed to pay all costs associated with these disciplinary proceedings in the amount of $24,970.07 for which execution may issue from this Court upon finality of this Order.

All sitting. All concur.

FN1. Boone Circuit Court, Case Number

--- S.W.3d ----
--- S.W.3d ----, 2008 WL 4691793 (Ky.)

98-CI-795
Ky.,2008.
Cunningham v. Kentucky Bar Ass'n
--- S.W.3d ----, 2008 WL 4691793 (Ky.)

END OF DOCUMENT

Westlaw

--- S.W.3d ----
--- S.W.3d ----, 2008 WL 4691791 (Ky.)

Only the Westlaw citation is currently available.

THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

Supreme Court of Kentucky.
William J. GALLION, Movant
v.
KENTUCKY BAR ASSOCIATION, Respondent.
No. 2008-SC-000629-KB.

Oct. 23, 2008.

Background: In an attorney disciplinary proceeding, the attorney file a motion to withdraw his membership in the Kentucky Bar Association (KBA) under terms of permanent disbarment.

Holding: The Supreme Court held that in light of serious nature of charges of professional misconduct relating to attorney's role as counsel for some plaintiffs in class action suit against diet-drug manufacturer, attorney's motion would be granted.
Motion granted.

West Headnotes

Attorney and Client 45 ⚿59.12

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.12 k. Resignation; Voluntary Surrender of License. Most Cited Cases
Kentucky Supreme Court would grant attorney's motion to withdraw his membership in Kentucky Bar Association (KBA) under terms of permanent disbarment, where attorney had been charged with professional misconduct as counsel for some plaintiffs in class action suit against diet-drug manufacturer, which charges included failing to **communicate** with **clients** regarding amount of total **settlement**, regarding process for determining amount each plaintiff would receive, and regarding options available to clients if they rejected their **settlement** amounts, receiving excessive fees by collecting not only contingency fees but also additional fees from total **settlement** proceeds, engaging in improper fee-splitting with attorneys and non-lawyers, failing to explain to clients the conflicts of interest regarding the clients competing with each other for **settlement** funds and regarding the attorney's interest in collecting fees from **settlement** fund beyond the contingency fee, using **settlement** funds for attorney's personal purposes, failing to supervise associate attorneys and non-lawyer employees, and making false statements to tribunal. Sup.Ct.Rules, Rule 3.480, 3.130, Rules of Prof.Conduct, Rules 1.4(a, b), 1.5, 1.7, 1.8, 1.15, 2.1, 3.3(a)(1), 5.1, 5.3(a, b), 5.4(a), 5.5(b).

OPINION AND ORDER

JOHN D. MINTON JR., Chief Justice.
***1** The Movant, William J. Gallion, KBA Member Number 24167, 163 East Main Street, Suite 401, Lexington, Kentucky 40507, moves this Court to withdraw his membership to the Kentucky Bar under terms of permanent disbarment. Pursuant to SCR 3.480, Movant admits that his conduct in the case, *Darla Guard, et. al. or Jonetta Moore, et. al. v. A.H. Robins Company, et. al.*[FN1] (hereinafter the Fen-Phen case), violated certain Supreme Court Rules as charged in KBA File 9340. For the reasons set forth herein, we grant Movant's motion.

The charges against Movant stem from a class action lawsuit filed against American Home Products (AHP) in the Boone Circuit Court in July 1998, on behalf of several plaintiffs who claimed to have been injured by AHP's diet drug, Fen-Phen. All of the plaintiffs Movant represented entered into contingency fee contracts with him. A settlement agreement was reached in May 2001 resulting in

one lump sum payment to be divided among all plaintiffs. The agreement also provided that a portion of the settlement would be paid to Movant and two other attorneys, Melbourne Mills, Jr. and Shirley A. Cunningham, Jr., who were affiliated with the case. The agreement allowed Movant, Mills, and Cunningham to divide the settlement amount between plaintiffs at their discretion and also determine how much they personally were to be paid. The total amount of settlement funds to be distributed was $200,450,000.

A staff member working with Movant, Mills, or Cunningham contacted each of the plaintiffs and informed them how much settlement money he would receive. The plaintiffs were never informed that their lawyers actually determined the amount of money they were to be given. If a plaintiff complained about the settlement amount, he was coerced by the attorneys or their staff to take the amount offered under the guise that it was what AHP had specifically offered them. Each plaintiff signed a confidentiality agreement and some plaintiffs were even told that they could go to jail if they discussed the terms of their individual settlement. At no point were the plaintiffs told about the total settlement arrangement from AHP. No plaintiff received a notice of the settlement process, the manner in which their settlement amounts were decided upon, or their right to opt out of the settlement and proceed to trial. Additionally, Movant previously entered into an agreement with attorneys Stanley Chesley, David Helmers, and Richard Lawrence to share attorney fees received from the case. The plaintiffs were never informed of this fee-splitting arrangement.

In June 2002, nearly $70 million of the settlement funds had not been distributed. The money was improperly depostied in the personal accounts of the attorneys. An order was entered by Judge Bamberger of the Boone Circuit Court to give fifty percent of the remaining funds to the plaintiffs, and fifty percent to Movant, Mills, Cunningham and several other attorneys for "indemnification or contingent liabilities." The record shows that there were no "contingent liabilities."

***2** In July 2002 another order was issued by the Boone Circuit Court. This divided any remaining funds between the attorneys for "outstanding litigation and administrative expenses" and a charitable organization which was to be created. No statement exists showing what outstanding litigation or administrative expenses existed at that time. The July 2002 order implied that all plaintiffs had consented to the creation of the charity. However, the record clearly shows that the plaintiffs did not knowingly consent to the creation of a non-profit charity like the one being proposed.

In January 2003, The Kentucky Fund for Healthy Living, Inc., was registered with the Secretary of State as a 501(c)(3) corporation. Movant, Mills, and Cunningham transferred $20 million of the remaining settlement from their own personal accounts in order to fund the entity. Movant was paid a salary for serving as one of the charity's board members.

In total, the attorneys received approximately $104,337,000 from the total settlement. Movant and his firm received fees in excess of $56 million.

From these acts, Movant is charged with twenty-two violations of our Supreme Court Rules. These charges are:

1) The Movant violated SCR 3.130-1.4(a) by failing to adequately communicate with the plaintiffs that he represented in the Fen-Phen case;

2) The Movant violated SCR 3.130-1.4(b) by failing to inform his clients in the Fen-Phen case of relevant information, including but not limited to: the failure to communicate the amount of the total settlement from AHP to his clients; the failure to explain to his clients the process for determining the amount that each of the plaintiffs would receive; the failure to inform his clients of the options available in the event that the settlement amount for that individual client was rejec-

ted by the client; and by instructing or allowing others to give his clients inaccurate information about multiple aspects of the case;

3) The Movant violated SCR 3.130-1.5(a) by receiving an excessive fee in the Fen-Phen case, by receiving both a contingency fee from each of his clients who were plaintiffs in the lawsuit and additional fees from the total settlement proceeds;

4) The Movant violated SCR 3.130-1.5(c) by failing to provide his clients with a written statement explaining the outcome of the matter, by failing to provide each of his clients with an accounting stating how the client's settlement, the attorney fee, and reimbursement for costs were calculated, and by providing incorrect information as to the method of determination of the client's portion of the statement;

5) The Movant violated SCR 3.130-1.5(e) by failing to disclose to his clients that he divided fees with Mills, Cunningham, Chesley, Helmers, and Lawrence; by dividing fees with the other lawyers, not in proportion to the services performed, nor pursuant to a proper agreement, and by failing to gain the approval of his clients for splitting fees with other attorneys not in his law firm; and because the totality of the fees paid to the Movant, Cunningham, Mills, Chesley, Helmers, and Lawrence was unreasonable;

*3 6) The Movant violated SCR 3.130-1.7(a) when in representing multiple clients who were competing for the same settlement funds he failed to explain the ramifications of the multiple client representation to his clients, and by failing to obtain his clients' consent in the multiple representation and division of the settlement funds;

7) The Movant violated SCR 3.130-1.7(b) by accepting a lump sum settlement from AHP, assisting in allocating less than one-half of the settlement funds to the clients, and then receiving an excessive fee for himself and those under his control from the remainder of the settlement proceeds. This method of determining the individual settlement amounts of his clients while having a stake in retaining a large amount of the settlement funds for his own attorney fees or contractual obligations of fee-splitting with non-lawyers and other lawyers, violates SCR 3.130-1.7(b). In addition, the Movant failed to obtain consent of multiple clients in a single matter or to include any explanation of the implications of such an arrangement in the division of the money;

8) The Movant violated SCR 3.130-1.8(a) by acquiring an interest in the settlement funds beyond his written fee agreement. The Movant's interest in the settlement funds was created when he accepted a lump sum settlement to be divided between his clients, the other plaintiffs, the other attorneys, and the lay persons with whom he would split fees, in order to receive a fee in excess of the amount stated in the contingency fee contracts with his clients;

9) The Movant violated SCR 3.130-1.8(g) as referenced above, including but not limited to, his actions: in failing to explain to his clients that AHP made a lump sum settlement to all of the plaintiffs and the total amount thereof; in failing to explain that the settlement agreement stated that the plaintiffs' attorneys would determine the amount that each plaintiff would receive from the lump sum settlement; in failing to disclose or explain the proposed allocations in the settlement agreement; in failing to communicate the amount of the total settlement from AHP to his clients and to the plaintiffs in the overall lawsuit; in failing to consult with his clients at all; and in failing to obtain the consent of his clients to make an aggregate settlement;

10) The Movant violated SCR 3.130-1.8(j) by acquiring a proprietary interest in the litigation. The Movant's interest in the litigation was created when he accepted a lump sum settlement to be divided between his clients, the other plaintiffs, the attorneys, and the lay persons with whom he had agreed to split fees, all with the knowledge that

he would receive a fee in excess of the amount stated in the contingency fee contracts with his clients;

11) The Movant violated SCR 3.130-1.15(a) by co-mingling his property with that of his clients, by using those funds for personal use, by participating in transfers of money from the escrow account to purchase automobiles for his employees; and by moving, or participating in moving, funds belonging to clients out of the state;

*4 12) The Movant violated SCR 3.130-1.15(b) by failing to turn over to the clients the funds to which they were entitled, and by failing to provide an accurate accounting of the distribution of the total settlement received from AHP as well as the individual clients' settlement distribution;

13) The Movant violated SCR 3.130-1.15(c) by removing funds that did not belong to the Respondent, re-depositing the funds in a personal account, and later transferring personal funds back to the original account to cover second client distributions, and initially, upon receipt of the funds, by failing to make the proper accounting to his client before withdrawing funds for him- self;

14) The Movant violated SCR 3.130-2.1 by failing to exercise independent professional judgment in distributing the lump sum settlement from AHP or by failing to render any candid advice to his clients during the representation, including whether to accept the proposal the attorneys made;

15) The Movant violated SCR 3.130-5.1 by making insufficient efforts to supervise his associate, David Helmers, and permitting his associate to violate the Rules of Professional Conduct, as well as directing and ratifying the conduct of David Helmers in misleading and deceiving the clients in connection with the acceptance of the settlement amounts which had been arrived at by the Movant and co-counsel, rather than in an arms length negotiation;

16) The Movant violated SCR 3.130-5.3(a) by failing to have in effect policies and procedures to ensure that his non-lawyer employees were acting in accordance with the lawyer's ethical duties in their dealings with the clients and discussions about settlement matters;

17) The Movant violated SCR 3.130-5.3(b) by failing to appropriately supervise his non-lawyer employees in order to ensure that their conduct was compatible with his ethical duties in their dealings with the clients and discussions about settlement matters;

18) The Movant violated SCR 3.130-5.4(a) by paying a percentage of legal fees to non-lawyers, including but not limited to a trial consultant and a mediator;

19) The Movant violated SCR 3.130-5.5(b) by assisting and permitting non-lawyers in his employ and that of the other counsel to give legal advice to his clients with regard to their litigation and the acceptance of proposed settlements;

20) The Movant violated SCR 3.130-8.3(a) by violating the Rules of Professional Conduct and by knowingly assisting the other plaintiffs' lawyers, non-lawyers working for the plaintiffs' lawyers, and the Boone Circuit Judge to violate the Rules of Professional Conduct;

21) The Movant violated SCR 3.130-8.3(c) as described above, including, but not limited to, his actions: in deceiving his clients into accepting the individual settlement amounts; in deceiving clients about their claims even after demand for more specific accounting; in misrepresenting to the Boone Circuit Court that his clients had agreed to donate a substantial portion of the total settlement received from AHP to charity; in failing to inform the Boone Circuit Court that he had contingent fee contracts with all of his clients which set a specific fee; and in providing, or as-

sisting in providing, false or misleading information to the Boone Circuit Court about the fees and expenses, as well as the manner in which the settlement had been reached by each of his clients, and in misappropriating funds over and above his fee contracts;

*5 22) The Movant violated SCR 3.130-3.3(a)(1) by advising the Boone Circuit Court that his clients had agreed to donate millions of dollars to a charitable organization, when in fact some of the Respondent's clients were not informed of the possibility that a portion of the settlement proceeds may be donated to charity, some clients were informed that a nominal amount may be donated to charity, and others objected to the donation of any amount of the settlement to charity. Further, the Movant advised, or participated in advising, the Boone Circuit Court of false statements of fact relative to the method of dividing the settlement among the client and the lawyers, and the application of the fee contracts to that division.

The Movant now moves to withdraw his membership from the Kentucky Bar and to terminate the disciplinary proceedings against him. Movant admits that "his conduct violated certain Rules of the Kentucky Supreme Court as charged by the Inquiry Commission."In particular he admits that:

1) he did not tell his clients in writing that he had made fee arrangements with other attorneys; 2) he did not advise his clients concerning the mediation of their case, or provide them an opportunity to be present at the mediation or present input as to the value of their specific case; 3) he did not advise his clients of the total settlement amount and did not comply with the requirements of SCR 3.130-1.8(g); 4) he did not advise his clients that he was seeking fees that were more than the contingent fees provided in his contingent fee contracts; 5) he did not comply with the requirements of SCR 3.130-1.15 to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property ... in a separate account maintained in the state where the lawyer's office is situated ..."; 6) he did not disclose to the clients that he intended to request that the Judge consider placing approximately $20,000,000 of the settlement funds into the Kentucky Fund for Healthy Living, Inc., or obtain their consent to that distribution; 7) he participated as a paid director of that Fund without client consent; and, 8) he did not disclose to his clients that their individual settlement amounts were being determined by a settlement protocol developed and administered by their own lawyers, not by the Defendant.

The KBA strongly urges this Court to sustain the motion and disbar Movant. In light of the seriousness of the charges against Movant and his admission of guilt, we grant Movant's motion.

Thus, it is ORDERED that:

1) Movant, William J. Gallion's motion to withdraw his membership in the Kentucky Bar Association under terms of permanent disbarment is granted. Movant thusly, may never apply for reinstatement to the Bar under the current rules;

2) Movant in accordance with SCR 3.390, shall notify all Courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar matters, of his inability to continue representation;

*6 3) Movant shall immediately cancel and cease any advertising activities in accordance with SCR 3.390;

4) All current bar disciplinary proceedings against Movant are hereby terminated;

5) In accordance with SCR 3.450, Movant is directed to pay all costs associated with these disciplinary proceedings in the amount of $24,928.25 for which execution may issue from this Court upon finality of this Order.

All sitting. All concur.

FN1. Boone Circuit Court, Case Number 98-CI-795

Ky.,2008.
Gallion v. Kentucky Bar Ass'n
--- S.W.3d ----, 2008 WL 4691791 (Ky.)

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