

PROFESSIONAL LIABILITY UPDATE

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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, L.L.P.

Baron v. Vogel, No. 3:15-CV-232-L, 2016 U.S. Dist. LEXIS 44294, (N.D. Tex. March 31, 2016)

You can't avoid paying your attorney by pleading breach of fiduciary duty. Plaintiff brought an action against Vogel and Gardere Wynne Sewell, LLP (“Gardere”) in 134th Judicial District of Dallas County for various theories including wrongful appointment of receivership and breach of fiduciary duty. The case was removed to federal court on the basis that the action was related to Vogel’s appointment by the Federal District Court as a Receiver in an underlying action. Plaintiff contends that Vogel breached his fiduciary duty while acting as a Receiver. However, his real complaint was the appointment of the Receiver and the award of \$425,857.76 in professional fees and expenses.

The Court found that even though the 5th Circuit had reversed the District Court on its appointment of a Receiver (Vogel), the Receiver was still entitled to his fees and to immunity in connection with the administration of the receivership as long as they were acting pursuant to the Court’s Receivership Order. Subsequently, the District Court granted Vogel’s 12(b)(6)

motion for failure to state a claim on all of Plaintiff’s causes of action.

Zbranek Custom Homes v. Allbaugh, No. 03-14-00131-CV, (Tex. App.- Austin, [3rd Dist.], November 3, 2015.

Common law duty to perform a contract with care and skill and the failure to meet this standard can provide the basis for recovery for a non-contracting party. Zbranek was the general contractor for Bella Cima in the construction of a home. Bella Cima leased the home to the Allbaughs. During the winter, the Allbaughs started a fire in the fireplace. However, because the firebox had not been properly installed, the fire escaped from the firebox and caught the home on fire. Due to the location and size of the fire, the fire department was called. In the process of the fire being extinguished, the Allbaughs’ personal possessions were damaged by the water in addition to the fire.

During construction, Zbranek voluntarily made changes to the fireplace/firebox disregarding the instructions set forth in the architectural plans. Because Zbranek contracted with Bella and not the Allbaughs, they argued

Texas law does not impose a duty on a general contractor to third parties, like the Allbaughs. However, in 2014, the Texas Supreme Court did find there is a common law duty to perform a contract with care and skill and the failure to meet the implied standard might provide a basis for recovery in tort. *Champion Custom Homes, Inc. Dallas Plumbing Co.* 445, S.W.2d, 716, 718-719 (Tex. 2014). Therefore, based on the fact that Zbranek inserted a different fire box than provided for in the architectural plans, made changes to the framing of the firebox, used combustible materials within 8 inches of the firebox, allegedly inspected/approved the sheathing and stucco around the firebox, he (Zbranek) exercised sufficient control over the construction of the fireplace as to owe a duty of reasonable care to the Allbaughs.

Simmons v. Jackson, No. 3:15-V-1700-D, 2016 U.S. Dist. LEXIS 61388 (N.D. Dist. Texas, May 10, 2016)

Provide a complete copy of the client's file to the client, upon request. Plaintiff sued his former lawyer, Ray Jackson, on claims of fraud, legal malpractice and conspiracy arising from Jackson's representation of Simmons. Jackson represented Simmons in an underlying action until November 2012, at which time Simmons terminated Jackson. In 2015, Simmons brought this action against Jackson. Jackson filed a 12(b)(6) motion asserting statute of limitation as a defense to Simmons' legal malpractice claim and the defense of fracturing as to the fraud claim. The Court denied Jackson's motion based upon Simmons Second Amended Complaint asserting Jackson failed to return a complete copy of Simmons' file.

Fitts v. Richards-Smith, No. 06-15-00017-CV, (Tex. App. –Texarkana [6th Dist.], February 17, 2016.

The problems that may arise by representing both the driver and passenger(s) of a motor vehicle accident. The Plaintiffs were injured as a result of a motor vehicle accident. Attorney Richards-Smith, represented the passengers and the driver, who was killed, in a product liability action against Toyota. Unbeknownst to Richards-Smith, the Plaintiffs' settled with the driver's insurance carrier, which in turn created additional issues concerning liability in the Toyota case.

Plaintiffs sued Richards-Smith for legal malpractice and breach of fiduciary duty based on an assertion that Richards-Smith failed to address the issue of conflict of interest by representing both the passengers and the driver. Richards-Smith asserted in a Motion for Summary Judgment that Plaintiffs were attempting to fracture their legal malpractice action by asserting a breach of fiduciary duty claim.

The Court does a good job in describing the difference between a breach of fiduciary duty claim and a negligence claim. A legal malpractice action arises from an attorney giving a client bad legal advice or otherwise improperly representing the client. Whereas, in a breach of fiduciary duty, the focus is whether an attorney obtained an improper benefit from representing a client, not whether the attorney adequately represented the client. In the case at hand, the Plaintiffs argued Richards-Smith did not adequately advise them regarding the conflict of interest because they sought the larger fees associated with representing all parties in the product liability case. The court rejected the Plaintiffs' argument that their former attorney personally benefitted from dual representation sufficiently to allege the types of dishonest or intentional deception that would support a breach of fiduciary duty.