PROFESSIONAL LIABILITY UPDATE

Spring 2017

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This newsletter is intended to summarize significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every recent case involving professional liability issues nor 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 authors and do not necessarily reflect the views of Harris, Finley & Bogle, P.C.

***First United Pentecostal Church of Beaumont v. Parker*, No. 15-0708, 2017 WL 1032754 (Tex. Mar. 17, 2017)**

Case Summary: The First United Pentecostal Church of Beaumont (the "Church") filed suit against The Lamb Law Firm (the "Firm"), Kip Lamb ("Lamb"), and Leigh Parker ("Parker"). The Church alleged that the Firm, Lamb, and Parker misappropriated approximately $1.1 million placed in the Firm's trust account. This appeal focused on Parker's liability.

The Church retained the Firm to defend it against a sexual harassment lawsuit. Unrelated to that lawsuit, the Church settled an insurance claim. Concerned that the sexual harassment plaintiffs would target those settlement funds, the Church placed the funds in the Firm's trust account in April 2008. By 2009, Lamb had transferred most of the funds to his personal accounts or the Firm's operating account. Lamb told Parker about the theft in the summer of 2010, but neither told the Church. In July 2011, Parker told the Church's trustees that the money was still in the account. Parker finally told the Church in October 2011 that the funds were gone and could not be replaced. Lamb was sentenced to 15 years in prison for the scheme.

After the Church filed suit for breach of fiduciary duty and conspiracy, Parker filed a motion for summary judgment and argued that no causation existed between his actions and the Church's damages. The trial court granted the motion, and the appellate court affirmed. The Texas Supreme Court affirmed in part and reversed in part.

In evaluating the breach of fiduciary duty claim against Parker, the Texas Supreme Court relied on *Kinzbach Tool Co. v. Corbett-Wallace Corp*.[1] The Court stated that in the context of an attorney-client relationship, a client need not prove causation and actual damages to obtain equitable relief, including fee forfeiture. The Court distinguished the case from cases where actual damages are sought, which require proof of causation. No evidence showed that Parker's actions caused harm to the Church because Lamb's theft occurred before Parker knew about it. Parker's failure to timely notify the Church caused no additional harm. However, the lack of causation did not bar the Church's claim for equitable relief against Parker.

The Church alleged two possible conspiracies: (1) conspiring in the theft and (2) conspiring to cover it up. The Court held that while Parker may have indirectly obtained illicit funds, no common plan to steal the money existed between Lamb and him. The Church presented evidence that Parker conspired with Lamb to cover up the theft, but the "conspiracy" did not cause additional harm since the theft was complete prior to the cover-up.

Practice Point: Attorneys should exercise extreme caution and maintain complete

[1] 160 S.W.2d 509 (Tex. 1942).

transparency when using, monitoring, and tracking client funds in trust accounts.

***Nawracaj v. Genesys Software Systems, Inc.*, No. 14-15-00602-CV, 2017 WL 924495 (Tex. App.—Houston [14th Dist.] Mar. 7, 2017)**

Case Summary: Richard Nawracaj ("Nawracaj") is an Illinois attorney. Nawracaj represented Genesys Software Systems ("Genesys"), which sued a bank in federal court in Dallas. Nawracaj engaged the Travis Law Firm ("Firm") as local counsel and obtained admission *pro hac vice*.

The Firm sued Genesys for unpaid bills in state district court. Genesys filed a counterclaim and third-party petition against Nawracaj, who unsuccessfully argued that the court lacked personal jurisdiction. The 14th Court of Appeals affirmed the personal jurisdiction over Nawracaj. The long-arm statute permits a court to exercise personal jurisdiction when a non-resident commits a tort in the state. TEX. CIV. PRAC. & REM. CODE § 17.042(2). The allegations of Nawracaj negligently supervising local counsel, failing to monitor billings, and making misrepresentations to Genesys satisfied the statute, even though he never visited Texas. The trial court's actions complied with due process according to the appellate court. Nawracaj had the minimum contacts necessary for specific jurisdiction because he purposefully availed himself of the privilege of practicing law in Texas through his *pro hac vice* admission. Nawracaj's role in the litigation was substantial and beneficial, and his location in Illinois did not preclude the court from exercising jurisdiction. Additional contacts included recruiting local counsel, having the local counsel sponsor his *pro hac vice* application, and profiting from the representation.

Practice Point: Non-Texas attorneys that represent clients in federal courts are subject to personal jurisdiction in a malpractice suit.

***Gillespie v. Hernden*, No. 14-15-00405-CV, 2016 WL 7234067 (Tex. App.—San Antonio Dec. 14, 2016)**

Case Summary: David Gillespie and Michael O'Brien ("Clients") sued their attorneys, A.L. Hernden ("Hernden") and Frederick Zlotucha ("Zlotucha"). The Clients signed a contingent fee agreement with Hernden for representation in an oil & gas dispute ("CFA"). The CFA stated that Hernden's fee would be 50% of any recovery with the Clients paying all costs. Hernden subsequently asked Zlotucha to assist with the case. The Clients were informed of Zlotucha's involvement, agreed to it, met with him on several occasions, and accompanied him to court proceedings. The Clients did not have a written CFA with Zlotucha, and no written fee-sharing agreement existed between the attorneys. The case settled for $40,000 and a 1% overriding royalty interest ("ORI"). The Clients and attorneys signed a settlement-disbursement agreement.

The Clients claims focused on the allegedly unreasonable fee, that the CFA included improper provisions, the lack of a written CFA with Zlotucha, and the absence of a written fee-sharing agreement. The trial court granted the attorneys' motion for summary judgment. The 4th Court of Appeals affirmed.

The Clients did not have a written CFA with Zlotucha, but the court upheld the agreement based on a quasi-estoppel theory. While the Govt. Code requires CFAs to be in writing, and no written CFA existed as to Zlotucha, the court reasoned that the Clients nonetheless received the statute's protections because of the written CFA with Hernden. The Clients were also informed and implicitly agreed to the representation. The court upheld the unwritten fee-sharing agreement on a similar analysis.

The Clients also alleged self-dealing because Hernden did not explain the ORI's potential benefit. The court held that while Disciplinary Rule 1.04(d) requires the CFA to outline how the fee will be determined, the rule does not impose a duty to explain a contingent fee's potential value.

Practice Point: Attorneys should reduce all contingent fee agreements and fee-sharing arrangements to writing. While this is certainly the best practice and required under most circumstances, *Gillespie* highlights that some

contingent fee agreements can be upheld based on equitable principles.