ATTORNEY NEGLIGENCE: CLIENT'S RECOVERY FOR LOSS OF OPPORTUNITY TO APPEAL

Better Homes, Inc. v. Rodgers
195 F. Supp. 93 (N.D.W.Va. 1961)

Judgment was entered against Better Homes for negligently re-roofing a house, thereby causing the house to be destroyed by fire. The attorney for Better Homes negligently failed to file an assignment of errors within the time prescribed by statute, thus losing the opportunity for successful appellate review. Better Homes then instigated this suit against its attorney for negligence and prayed to recover the judgment rendered against it in the original suit. The District Court held that plaintiff could not recover because he failed to prove that upon appeal of the original case, he would have been entitled to reversal and judgment in his favor as a matter of law.

The courts permit recovery for the costs and expenses of the appeal upon proof that the attorney was negligent without proof that appellate review would have been successful.[1] The reimbursement of these expenses is justified on a consideration of fairness rather than upon proof of the causal relationship ordinarily necessary in negligence actions. The notion is explicit that the client has "a right to get what he paid for." In *Rosebud Mining & Mill Co. v. Hughes*, the court commented:

> . . . the complaint unquestionably stated a cause of action for the recovery of the $139.00 paid for the bill of exceptions and the $200.00 for other expenses of the appeal . . . . It is immaterial so far as the right to recovery of these sums is concerned what the action of the appellate court would have been . . . . Under the facts stated, Plaintiff was entitled to recover back these sums if the Defendant negligently failed to comply with the terms of his employment.[2]

When the client goes further and attempts to recover the judgment rendered against him in the original suit, the objection is frequently raised that this item of loss is too remote and speculative. This objection is based on the fundamental rule that damages must be certain as to their cause.[3]

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[1] Cornelissen v. Ortt, 132 Mich. 294, 93 N.W. 617 (1903). In *Laux v. Woodworth*, 195 Wash. 55, 81 P.2d 531 (1938), the client alleged that his attorney was negligent by failing to file a statement of facts in time, causing the client to lose his opportunity for successful appellate review. The client prosecuted the suit on two causes of action: one for the recovery of expenses incidental to the appeal and one for the recovery of general damages. The appellate court, affirming the trial court, held that plaintiff was entitled to recover on his first cause of action, but that the demurrer to the second cause of action was properly sustained as the client had failed to allege that appellate review would have been successful. See also Rosebud Mining & Mill Co. v. Hughes, 16 Colo. App. 162, 64 Pac. 247 (1936).

[2] Rosebud Mining & Mill Co. v. Hughes, *supra* note 1, at 163, 64 Pac. at 248.

[3] Johnson v. Atlantic Coast Line R.R., 184 N.C. 101, 113 S.E. 606 (1922);

But courts have rejected this argument and have held that if the client can prove that his attorney was negligent and that had the appeal been taken, his claim would have been successful, then the client's damages are the proximate result of his attorney's negligence and hence are recoverable.[4] A ruling that the judgment rendered against the client is too speculative to be recovered in a later suit against his attorney would free an attorney from liability for negligence in the conduct of litigation, and thus, seriously impair the reputation of the Bar.[5]

The principal case held that the client must prove that his attorney was negligent and that "but for" this negligence, the result on appeal would have been favorable. Thus, on the issue of proximate cause the client must allege and prove:

(1) That in a state where there is no longer a right of appeal, the appellate court would have accepted the case for review had it been timely;
(2) That the appellate court would have reversed the case and either entered judgment for the client as a matter of law on the original suit or remanded the case for a new trial; and
(3) That had the case been remanded for a new trial, *the client would have been entitled to judgment as a matter of law upon retrial.*[6]

"In other words, this involves a 'suit within a suit' and the client must show that he would have won the first suit as one step in order to win the second one."[7]

The rule adopted by the court in the principal case in effect denies the client recovery in those cases where, upon retrial of the original suit, it would have been submitted to the jury which would have rendered a verdict in his favor. The rationale for this limitation on the client's right of recovery is that if the client can prove that upon a retrial of the original suit the jury would render a verdict in his favor, then his failure to convince the original jury must have been caused by his weakness in presenting

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Western Union Teleg. Co. v. Foy, 32 Okla. 801, 124 Pac. 305 (1912); Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co., 141 N.C. 284, 53 S.E. 885 (1906).

[4] Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D.W.Va. 1961); General Accident Fire and Life Assur. Corp. v. Cosgrove, 257 Wis. 25, 42 N.W.2d 155 (1950). In *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78, 79, the court stated: "In the present case, the attorney was negligent in failing to file the notice of appeal . . . . The question is, what damages are proximately caused by that negligence? . . . If the judgment rendered against him [client] for $1,660.00 was erroneous to the extent that it would have been reversed on appeal under circumstances that would not require him to pay it, he has suffered serious damages indeed . . . . If proof of the required facts can be made appellant should be able to recover the damage suffered."

[5] Better Homes, Inc. v. Rodgers, *supra* note 4.

[6] *Id.* at 94.

[7] Wade, "The Attorney's Liability For Negligence," 12 Vand. L. Rev. 755, 769 (1959).

his case to that jury. Therefore, any damages sustained by the client were proximately caused by the weakness of his own presentation of the case and could not have been proximately caused by the negligent loss of the opportunity to appeal.[8]

The fallacy underlying this reasoning is the assumption that the same evidence will always be presented to the jury on retrial which was presented to the jury in the original suit. For example, in the principal case, the court in reviewing the record of the original trial stated:

> In the light of the evidence, I find that there are none of the rulings of the trial court to which exceptions were saved, on the admissibility of evidence . . . which even if erroneous, constitute error the correction of which would impel a directed verdict in favor of the Defendant [client] in that trial.[9]

The court thus limited itself to a search for an error so vital that it would have entitled the client to a judgment as a matter of law upon retrial. It is conceivable that the trial judge made errors in his rulings on the admission of evidence which constituted prejudicial error and thus entitled the client to a retrial of the case before a jury. Upon a retrial of the case the evidence as corrected would be presented to the second jury. Thus the same evidence would not always be presented to the jury upon a retrial of the case as was presented to the original jury.

Assuming that there were such errors in the original trial, the argument that the client's loss could have been proximately caused only by the weakness of his own case as presented to the first jury is untenable, as the client's loss could have been proximately caused by an erroneous ruling of the trial judge. Thus, to determine the proximate cause of the client's damages it is necessary to retry the original suit in the suit between the client and his attorney. If the jury determines that a hypothetical jury upon retrial of the original suit would have rendered a verdict in favor of the client, then it is apparent that the client's loss was proximately caused by the negligence of his attorney in losing the opportunity for appellate review.[10] Therefore, it would be desirable to extend the client's right of

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[8] See Better Homes, Inc. v. Rodgers, *supra* note 4, at 95.

[9] *Id.* at 97.

[10] The procedure suggested above would require the jury in the suit between the client and the attorney to determine what a hypothetical jury would have done had the case been retried. This procedure would be similar to that employed in the cases where an attorney negligently fails to file a petition within the time set by the statute of limitations. In the suit between the client and his attorney, it becomes necessary for the jury to determine what a hypothetical jury would have done had the original case been tried.

The major objection raised to this procedure is that it requires the jury to "second guess" what the hypothetical jury would have done. In *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (1904), the court negated this argument stating: "It is known that judgments for damages . . . are recovered and collected for slander and it will not do to say that attorneys at law are not liable to their clients in managing such

recovery to those cases where the client alleges and proves that upon a retrial of the original suit the jury would have rendered a verdict in his favor. The expansion of the rule to encompass this situation would grant the client a remedy where he presently has none and yet has suffered damages as a proximate result of his attorney's negligence.

cases because of the difficulty a jury may have in arriving at the damages occasioned by such negligence for this would absolve them from all liability for negligence in such cases." There has even been the additional suggestion that the issue should be presented to the jury for their independent determination. Coggin, "Attorney Negligence—A Suit Within A Suit," 60 W. Va. L. Rev. 235 (1958).