6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00495 COA

OTHELLO B. WALLACE, JR.

APPELLANT

v.

BONNER AND BIRMINGHAM (LAW FIRM): JAMES L. BONNER AND DRUE D. BIRMINGHAM, INDIVIDUALLY

APPELLEES

CONSOLIDATED WITH:

NO. 95-CA-01022 COA

OTHELLO B. WALLACE, JR. APPELLANT

v.

JAMES L. BONNER APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH C. WEBSTER

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PRO SE

ATTORNEY FOR APPELLEES:

GLENN F. BECKHAM

NATURE OF THE CASE: CIVIL - BREACH OF CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO APPELLEES

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Othello Wallace sued a defunct law firm of Bonner and Birmingham. He also joined James Bonner and Drue Birmingham, individually. Summary judgment was granted in favor of the law firm and Drue Birmingham. James Bonner individually was found liable to Wallace. After a subsequent hearing on damages, Wallace was awarded $1770. On appeal Wallace argues that summary judgment was improperly granted as to the liability of Birmingham and the law firm. He makes no arguments regarding the damage award. We reverse the determination that the law firm and Drue Birmingham were not liable, but affirm the damage award.

FACTS

Wallace sought legal services from the Bonner and Birmingham law firm in 1982. The firm filed a civil suit against Memphis Housing Authority (MHA) on behalf of Wallace. At all times, Wallace dealt with Bonner. The case against MHA was tried, and Wallace lost. Bonner filed an appeal in November of 1984. The appeal was dismissed in February of 1985 due to the failure of Bonner to file necessary documents with the court in compliance with the rules of appellate procedure. The law partnership had dissolved in December of 1984, which was prior to the dismissal. Wallace paid $1, 770 for the appeal. Of the $1,770, Wallace made checks payable to the law firm in the amount of $970 before the law firm had been dissolved. Unlike the previous amount paid, Wallace paid the remaining $800 directly to Bonner after the law firm had dissolved and the case had been dismissed by the court. Also, unlike the previous receipts given to Wallace, the receipt for his final payment of $800 had the name "James L. Bonner" rather than "Bonner and Birmingham" on it.

On December 12, 1989, Wallace brought suit against the law firm and against Bonner, individually. An amended complaint was filed on March 17, 1992. The defendants all filed for summary judgment on May 4, 1992. After a special judge was appointed to hear the case, the regular circuit judges having recused themselves, summary judgment was granted on liability on April 12, 1995. The court found that Bonner alone was liable. Prior to a scheduled hearing on damages, Wallace filed a notice of appeal from partial summary judgment on liability. That was an interlocutory appeal for which Wallace did not seek permission. M.R.A.P. 5(a). On September 15, 1995, the trial court entered judgment in favor of Wallace for the amount of $1770. Wallace filed a second notice of appeal.

The supreme court consolidated the two appeals, but briefing was conducted only on the liability issues of the first appeal. Wallace's only arguments are that summary judgment should not have been granted to the law firm and to Drue Birmingham. The appellant pro se moved that the record be supplemented, and that a briefing schedule be set for addressing damages. On March 11, 1997, the Court of Appeals granted that motion. However, though we have had a supplemental record provided that solely consists of the final judgment of September 15, 1995, Wallace has declined to brief any damage issues. The appellees consequently advised the court that they would not file a

supplemental brief either. Thus the only issues that we are asked to address concern liability.

DISCUSSION

Wallace alleges that because the 1984 appeal of his Memphis Housing Authority case was filed before the dissolution of the law firm, the law firm and the partners individually are liable for the damages he suffered. More specifically, Wallace sets out these three questions:

1. Whether the dissolution of a law partnership after an appeal has been taken on behalf of a client of the partnership excuses members of the partnership not prosecuting the appeal from any responsibility in assuring that the appeal is perfected by the former partner.

2. If the answer to the above is in the affirmative, does the failure to notify the client continue the obligation of the partnership as to that client?

3. Whether summary judgment should have been granted to Othello B. Wallace, Sr.

We disagree with the reasons given by the trial court for granting summary judgment in favor of the law firm and Birmingham. In *Guynn v. Brondum*, 63 So. 2d 821, 822 (Miss. 1953), the supreme court stated:

The character and sufficiency of the notice of dissolution of the partnership which will relieve one from the liability for acts of his former partner done subsequent to the dissolution of the partnership depends in large part upon whether the person to whom the notice is to be given has had former dealings with the firm. Those who have had actual dealings with the firm are entitled to be given actual notice of the dissolution, or its equivalent. [Citations omitted]. To all those who have previously dealt with a partnership, direct notice of dissolution or retirement must be actually given, or the knowledge thereof brought home to them. [Citations omitted].

Section 79-12-71 of the Mississippi Code states that "[t]he dissolution of the partnership does not of itself discharge liability of any partner." Section 79-12-69 reads:

After dissolution a partner can bind the partnership. . . (a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution; (b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction: (I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution;. . .

Wallace claims that he was never given notice of the dissolution of the law firm, and therefore, he thought he was dealing with the law partnership rather than Bonner individually. Neither the law firm, nor Birmingham, has offered proof that actual notice was given to Wallace of the dissolution. However, the firm and Birmingham argue that there is evidence that Wallace was aware of the dissolution by the time he made his last payment for the appeal. They base this argument on the fact that the last payment for the appeal was made payable to Bonner rather than the law firm, and the last receipt received by Wallace had only Bonner's name on it. Wallace argues that he never noticed the receipt was from Bonner only. Furthermore, he argues that the receipt was issued by the same secretary who had been employed by the law firm. We agree that the receipt was not indisputable

notice that the firm had dissolved such that summary judgment was proper.

The appeal against the Memphis Housing Authority was filed before the dissolution of the partnership. A total of $970 had been paid for this appeal before the dissolution. Although the case may have been handled exclusively by Bonner, this does not excuse the liability of the partnership. One lawyer's handling a case is a common practice of law partnerships. The supreme court has stated that "[t]he principle is too well established to require the citation of authority to the effect that the liability of partners is joint and several, each partner being liable for all of the partnership debts with the right of contribution from the other members of the partnership." *Williams v. Owens*, 613 So. 2d 829, 834 (Miss. 1993); citing *Shemper v. Hancock Bank*, 40 So.2d 742, 744 (1949).

We find that because the Memphis Housing Authority appeal was initiated before dissolution of the partnership, a fact question exists of whether proper notice was given to Wallace of the dissolution. If notice was not given, each partner would be jointly and severally liable for the debts of the partnership.

Our finding that the trial court erred in dismissing liability as to the firm and Birmingham on summary judgment does not entitle Wallace to a trial if the matter of his damages has been conclusively resolved, and those damages have been or are paid. In Wallace's initial brief there is no statement critical of the amount of damages. The one mention of damages, other than in the statement of facts regarding what he sought ($1,500,000) and what was awarded ($1770), is that he asks that the case be "remanded for the purposes of damages only." He does not tell us why $1770 is insufficient, or what additional damages he suffered, nor whether the trial erred in his analysis of the facts or the law. Thus Wallace fails the requirements of Rule of Appellate Procedure 28(a)(3), which are these:

Statement of Issues. A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.

This is not overly formalistic, complicated, or technical. No where in Wallace's initial brief is there a statement of an issue regarding the size of the judgment. No where is there a discussion of the elements of damages that Wallace is said to have suffered, and an explanation of why the trial court erred only in awarding $1770.

In Wallace's reply brief he only says that the payment of $1,770 would be "callous and ludicrous." He says he has spent several hundred, even thousands of dollars and time" prosecuting his malpractice claim. The Supreme Court has adopted the rule that it "will not consider issues raised for the first time in an appellant's reply brief." *Sanders v. State*, 678 So. 2d 663, 669 (Miss. 1996). The court further stated that "[a]ppellants will not be allowed to ambush appellees in their Rebuttal Briefs, thereby denying the appellee an opportunity to respond to the appellant's arguments." *Id.*

When this court granted Wallace's motion for supplemental briefing in order to allow him to discuss the damage issues, he declined to do so. As appellant, Wallace must point the court to alleged errors that he wishes corrected. As to damages, it is not enough to call the award "callous and ludicrous." Pro se litigants are "held to the same rules of procedure and substantive law as represented parties." *Dethlefs v. Beau Maison Devts.*, 511 So. 2d 112, 118 (Miss. 1987). Without having indicated

anything other than his displeasure with the amount of damages, and that only in his reply brief, Wallace has totally failed in his responsibility to identify errors for our review.

Some issues may be considered when not properly raised in the initial brief of the appellant:

As a rule, the supreme court only addresses issues on plain error review when the error of the trial court has impacted upon a fundamental right of the defendant. It has been established that where fundamental rights are violated, procedural rules give way to prevent a miscarriage of justice.

Sanders, 678 So. 2d at 670. We are not faced in this case with violations of fundamental rights. This case deals with liability and damages. The issue of damages has not been presented to this court for review. It does not fall under the plain error exception. The court below found that the only damages Wallace was entitled to was the amount of $1770, which was what was paid by Wallace to perfect an appeal. In the trial judge's order, he stated that this amount was owed only by Bonner because the partnership had terminated prior to the running of the statute of limitations for Wallace's appeal and that "for approximately six weeks after the dissolution of said Law Firm Mr. Wallace's Appeal was still viable."

Since Wallace has not identified any damage issue for our review, we affirm the amount of damages of $1770. If that amount has been or is paid, Wallace's issues against the law firm and Drue Birmingham are moot. The only issues would be whether Bonner is entitled to contribution, a matter that does not involve Wallace.

THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF SUMMARY JUDGMENT FOR THE LAW FIRM OF BONNER & BIRMINGHAM AND BIRMINGHAM, INDIVIDUALLY, IS REVERSED AND REMANDED. THE SUMMARY JUDGMENT FOR DAMAGES IN FAVOR OF WALLACE IN THE AMOUNT OF $1770 AGAINST BONNER IS AFFIRMED, WITH THE EXCEPTION THAT BIRMINGHAM AND THE LAW FIRM MAY BE JOINTLY AND SEVERALLY LIABLE FOR THIS AMOUNT DEPENDING ON ADDITIONAL PROCEEDINGS. COSTS ARE TAXED ONE-HALF TO APPELLANT AND ONE-HALF TO THE APPELLEES.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.