

**IN THE COURT OF APPEALS 2/27/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00907 COA**

**JAMES G. MCINTYRE**

**APPELLANT**

**v.**

**BOB PLUNKETT**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

F. HALL BAILEY AND J WILLIAM MANUEL

ATTORNEY FOR APPELLEE:

BOB PLUNKETT (PRO SE)

NATURE OF THE CASE: LEGAL MALPRACTICE

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF IN THE AMOUNT OF \$63,000.

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Bob Plunkett filed a *pro se* suit against James McIntyre for legal malpractice. Plunkett alleged that McIntyre was negligent in four separate instances, which resulted in damages to Plunkett. At trial, the jury returned a verdict in favor of Plunkett finding that McIntyre was negligent in representing

Plunkett. The jury returned a general verdict of \$65,000.00 (\$43,000.00 in actual damages, \$11,000.00 in punitive damages, and \$11,000.00 in mental anguish). Feeling aggrieved, McIntyre appeals to this Court asserting that Plunkett did not meet his prima facie case of legal malpractice, that mental anguish is not recoverable in a legal malpractice case, and finally, that the jury was not instructed on punitive damages.

Finding merit in McIntyre's argument that Plunkett did not prove all elements of legal malpractice in one allegation, we reverse and render on that issue. We also reverse and render on the damages of mental anguish and punitive damages. Because this was a general verdict, we are left with no other choice but to reverse and remand on the remaining three claims.

## FACTS

Bob Plunkett is the President and sole stockholder of Great American Builders, Inc. He retained James G. McIntyre to represent he and his company for various legal matters. It was during McIntyre's representations of Plunkett that Plunkett claims he was damaged by McIntyre's negligence. In particular, Plunkett claimed that McIntyre was guilty of negligence in representing Plunkett on four separate matters. The four claims involved the following:

- (1) Albert Martin and Sons matter;
- (2) Concrete Products matter;
- (3) Griffin matter; and
- (4) Mike Green matter.

Because there are four separate claims of negligence alleged by Plunkett, we will look at each claim separately.

### ALBERT MARTIN AND SONS

Bob Plunkett was indebted to Albert Martin and Sons in the amount of \$2,400.00, the amount which Plunkett had agreed to pay for sub-contracting work. To satisfy the debt, Plunkett gave McIntyre a check for \$2,400.00 instructing McIntyre to send the check to Albert Martin and Sons' attorney. Plunkett testified that McIntyre called Martin's attorney and told him that unless Martin accepted \$2,000.00 in settlement of the claim, Plunkett would declare bankruptcy. Martin agreed, and subsequently, McIntyre obtained a release from Martin after sending a check for \$2,000. The remaining \$400 was kept by McIntyre as an advance of attorney's fees.

McIntyre argues that because he had obtained a release from Martin, Plunkett was not damaged in any way. McIntyre claims that "the only potential claim of 'negligence' would be that rather than following Plunkett's directions, McIntyre settled the claim for less money than Plunkett expected to pay." On the other hand, Plunkett claims that because Martin was forced to accept less than what was owed him, Plunkett's reputation was damaged.

### CONCRETE PRODUCTS

Plunkett carried a check for \$1,200 to McIntyre to settle a lawsuit with Concrete Products.

However, McIntyre only sent \$800 to Concrete Products. Plunkett testified that a deputy sheriff came to his house and ordered him to bring his financial papers to the courthouse. Plunkett then contacted Concrete Products' attorney to see what happened and at that point learned that only \$800 of the agreed \$1,200 was sent. Later, after being confronted with the deficiency, McIntyre mailed the remaining \$400 to Concrete Products.

Plunkett testified that he was served with a subpoena to produce his records and checkbook regarding this claim by a sheriff's deputy. This theoretically could have resulted in Plunkett receiving damages to his reputation.

#### JAMES GRIFFIN

On August 1, 1990, Plunkett instructed McIntyre to file a lawsuit against James Griffin to recover \$15,000 in damages that Plunkett had suffered due to Griffin's failure to finish a concrete slab job. Plunkett alleged that McIntyre claimed that he had obtained a default judgment against Griffin, when in all actuality, no lawsuit had ever been filed.

McIntyre did not file the lawsuit until March of 1991. In the meantime, Griffin filed an answer denying liability and also filed a counterclaim against Plunkett. The counterclaim was not answered, and subsequently, on July 2, 1991, Green obtained a default judgment against Plunkett for close to \$15,000.

At this point, Plunkett hired another attorney, Mike Parker, to handle the case. After going to the courthouse, Parker found that an answer had never been filed to Green's counterclaim and that a default judgment had been entered. Plunkett testified that he "hired Mr. Parker to watch Mr. McIntyre" and to make sure that McIntyre was "getting the job done." He did this even though McIntyre continued to represent Plunkett in the Griffin matter.

McIntyre was successful in having the default judgment set aside, and was further successful in obtaining a judgment against Green for \$15,000. Plunkett complained that even though the default judgment was set aside and judgment was entered in his favor, he was damaged in that he had to hire a new attorney, Mike Parker, to go to court on two occasions to make sure McIntyre was doing his job.

Parker testified that his total bill for legal services rendered and expenses incurred in assisting Plunkett in various legal matters totaled approximately \$5,206.34. Parker testified that this work was in regard to three cases, the Green appeal, the Green case pending in county court, and the Griffin matter.

#### MIKE GREEN

Plunkett had a contract with Michael Green to perform some work. At the end of the job, Plunkett had a \$30,000 claim against Green for work completed for which he had not been paid. As a result Plunkett placed a lien on some of Green's property. However, the lien was improperly placed on Green's land which led to Green filing suit against Plunkett. Green obtained a judgment against Plunkett in the amount of \$14,539.83, representing the total amount of interest accrued on the land that would not have accrued but for the wrongfully filed *lis pendens* notice, the attorney's fees

incurred by Green in having the *lis pendens* removed and mental anguish suffered by Green as a result of the "steadfast and malicious refusal" of Plunkett to remove the *lis pendens* after being notified that the lien was improperly placed.

After discussing the case with McIntyre, Plunkett decided to appeal the case to the Mississippi Supreme Court. However, McIntyre did not file the appeal until one day after the notice of appeal deadline. Upon receiving the appeal, the Mississippi Supreme Court issued a show-cause order as to why the appeal should not be dismissed upon being filed one day late. Parker, who by now was handling the case, notified McIntyre and gave him an opportunity to "do whatever he could to keep the case active before the Mississippi Supreme Court." Affidavits were filed by McIntyre as to why the case was not properly appealed; however, the case was dismissed.

## DISCUSSION

The law in this State is clear. In order to recover in a legal malpractice action Plunkett must show (1) a lawyer-client relationship, (2) negligence or violation of a duty by the lawyer in the handling of the client's affairs, and (3) proximate cause and the extent of the injury alleged. *Hickox ex rel. v. Holleman*, 502 So. 2d 626, 633 (Miss. 1987).

First, McIntyre does not dispute that there was a lawyer-client relationship between the parties. Therefore, the first part of the prima facie case is met.

Second, Plunkett must prove that McIntyre was negligent in representing him. This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that negligence is a question for the jury to determine except in the "clearest cases." *Presswood v. Cook*, 658 So. 2d 859, 862 (Miss. 1995); *Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss. 1992). In this case, the jury found that McIntyre was negligent in representing Plunkett. We will not disturb that finding.

Third, Plunkett must prove that he was damaged and that his damages were proximately caused by McIntyre's negligence.

As to the Mike Green matter, this Court is left with no choice but to reverse and render for failure to meet the prima facie case of legal malpractice. As stated earlier, once Plunkett has proven that his attorney was negligent, he must show that he was damaged and that there was a proximate cause between his attorney's negligence and his damages. He must show that "but for [McIntyre's] negligence, [Plunkett] would have been successful in the defense ... of the underlying action." *Stewart v. Walls*, 534 So. 2d 1033, 1035 (Miss. 1988); *Hickox*, 502 So. 2d at 634; *Nause v. Goldman*, 321 So. 2d 304, 307 (Miss. 1975). This is where Plunkett's case was deficient.

At the trial below, the following exchange occurred between the trial court and Mr. Plunkett:

THE COURT: Here's my problem, Mr. Plunkett. And let me explain the upshot of the Defendant's argument. Their argument is that the Supreme Court has indicated that the law requires in a case of legal malpractice, which is what this is, that the Plaintiff, you, bringing the lawsuit needs to establish by a preponderance of the credible evidence that you would have prevailed on the

underlying claim. And that is to say before you would be entitled to any recovery from this Defendant in connection with any alleged legal malpractice, you would first need to show that but for his failure to timely perfect that appeal you would have prevailed in the Supreme Court. And that obviously would be a question for the jury to determine, but there must be some evidence upon which they could base a conclusion that you would have prevailed in the Mississippi Supreme court.

His argument is that there has been no evidence adduced at this trial upon which any reasonable juror could conclude that you would have prevailed in the Supreme court. And what I need to hear from you is, unless I missed it, what evidence was offered this morning or this afternoon from Mr. Parker to substantiate that you would have prevailed in the Supreme Court but for the failure of that appeal to be filed timely. What did you offer to support that claim?

MR. PLUNKETT: This morning?

THE COURT: Yes, sir.

MR. PLUNKETT: I haven't offered anything I don't imagine. That's what we're offering now, this ruling right here that would show --

THE COURT: But the jury has to base its decision on evidence.

Plunkett failed to show that, but for McIntyre's negligence, he would have prevailed on appeal to the Supreme Court. We are left with no choice but to reverse and render on this claim.

As to the other three claims involving Albert Martin, Concrete Products, and James Griffin, we must reverse and remand the case for a new trial on damages. The verdict in this case was a general verdict, meaning that the jury did not break down the damage award to each specific claim of negligence. Therefore, there is no way this Court can tell how much, if any, the jury would have awarded Plunkett on those three claims.

This Court must also reverse the award of mental damages. While there can be no doubt that Plunkett suffered emotional distress from his involvements with McIntyre, there was not sufficient proof placed before the jury which would substantiate such an award. Our supreme court has stated that "[a] legal malpractice plaintiff may not recover for emotional distress flowing from his dilemma with the law." *Singleton v. Singleton*, 580 So. 2d 1242, 1247 (Miss. 1991). Every person that is involved in a lawsuit "experiences substantial emotional distress from 'the rigors of an action, with all of its traumatic effect.'" *Id.* (quoting *Fulgham v. Snell*, 548 So. 2d 1320, 1322 (Miss. 1989)).

On remand, in order for Plunkett to recover for mental anguish he must show that McIntyre's "defaults have proximately caused him substantial emotional distress that may be differentiated from that attendant upon his legal plight." *Id.* In other words, he must show that the emotional distress that he suffered can be separated from the emotional distress that is generally encountered by the average

litigant.

Because we are reversing and rendering one claim and reversing and remanding the other three claims, the award of punitive damages becomes moot. However, we do point out that McIntyre was correct in his argument that the jury was not instructed as to punitive damages. Because of this fact, even if we were to affirm the award of actual damages, we would have to reverse the award of punitive damages.

Although Plunkett did request punitive damages in his original complaint, there is nothing in the record to indicate that the jury was given guidance as to a determination of the same. At retrial, if the trial court in its discretion allows the jury to consider a punitive damage award, the jury must be given instructions regarding the same. Obviously, the problem here was that Plunkett acted as his own lawyer. Without doubt Plunkett may have cause to have little faith in lawyers at this time, but he runs the risk of negligently prosecuting his own claim if he continues to go forward on his own.

**THE JUDGMENT OF LEGAL MALPRACTICE AS TO THE MIKE GREEN MATTER IS REVERSED AND RENDERED; THE JUDGMENT OF LEGAL MALPRACTICE ON THE OTHER THREE CLAIMS IS REVERSED AND REMANDED FOR A NEW TRIAL. EACH PARTY IS ASSESSED THE COST OF HIS OWN APPEAL.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.**

**PAYNE, J., NOT PARTICIPATING.**