22-cv-0599

In the District of Columbia Court of Appeals

JEROME STIEBER,

Appellant

v.

BURCHELL & HUGHES, PLLC, *et al.*,

Appellees

Appeal from the Superior Court of the District of Columbia
(Civil Division)
(Hon. Maurice Ross)

Reply Brief of Appellant Jerome Stieber

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I. INTRODUCTION

Appellant Stieber is not complaining that, absent his former counsel's negligence, he could have obtained a more favorable settlement; he is complaining that because of his former counsel's negligence, he failed to obtain the financial settlement that he agreed to accept. He agreed to accept $360,000.00 to settle his claims against Cumulus. His former counsel's negligence resulted in his failing to obtain that amount. In his First Amended Complaint, Mr. Stieber asserted facts that support this allegation, that but for his former counsel's negligence, he would have "fared better." The Superior Court erred by finding that Mr. Stieber could not, as a matter of law, prove his claims without a jury speculating about hypothetical decisions that were never, in fact, before the bankruptcy court.

II. LEGITIMATE DEDUCTION OF FACTS IS NOT SPECULATION

The Appellees' defense of the Superior Court's dismissal is based primarily on their claim that Mr. Stieber's alleged damages as a result of their negligence are speculative. Indeed, as both parties recognize, legal malpractice claims that arise out of hindsight-challenges to recommended settlements fail if they are based only on speculation. *See* Brief of Appellee, p. 8, citing *Macktal v. Garde,* 111 F.Supp.2d 18, 22 (D.D.C. 2000). Mr. Stieber's claim, however, is not a hindsight challenge based on speculation.

As this Court has explained, the term "'[s]peculate,' as used in negligence cases, is a word of art with a definite and limited meaning. We say, in effect, that a jury should never be permitted to guess as to a material element of the case such as damages, negligence, or causation." *Courtney v. Giant Food, Inc.,* 221 A.2d 92, 94 (D.C. 1966). "Speculation" refers to the lack of any evidence to support a reasonable inference as to an element of negligence. *See Jimenez v. Hawk,* 683 A.2d 457 (D.C. 1996). There is, of course, "a difference between 'mere conjecture' and 'legitimate deduction.'" *Marinopoliski v. Irish*, 445 A.2d 339, 341 (D.C. 1982). If sufficient circumstantial evidence is presented to a jury, it is "not left in the domain of speculation, but they have circumstances upon which, as reasonable minds, they may ground their conclusions." *McCoy v. Quadrangle Dev. Corp.,* 470 A.2d 1256, 1260 (D.C. 1983).

The Superior Court did not dismiss the First Amended Complaint for failing to include well-pleaded factual allegations; it dismissed the First Amended Complaint because it decided that those allegations do not plausibly give rise to an entitlement to relief. (JA0125) *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949-52 (2009). More specifically, it determined that Mr. Stieber is not plausibly entitled to relief because the facts alleged do not rise above the speculative level. This was error. The facts alleged allow reasonable minds to infer or legitimately deduce that

the Appellees caused Mr. Stieber damage. This is all that is required to survive a motion to dismiss.

III. MR. STIEBER SPECIFICALLY ALLEGED THAT HE WOULD HAVE FARED BETTER ABSENT COUNSEL'S NEGLIGENCE.

In his underlying First Amended Complaint, Mr. Stieber alleged that if his former counsel had understood the implications of the applicable liability insurance policy and the bankruptcy proceedings, then he would have "fared better." He alleged that his claim was covered by the Chubb policy, which far exceeded the agreed-upon value of his $1,160,000.00 claim against Cumulus. He alleged that he understood and agreed to settle that claim for $360,000.00 but, instead, he only received $12,000.00.

A. Mr. Stieber alleged that his former counsel did not even understand the terms of the $360,000.00 settlement that was reached.

Specifically, Mr. Stieber's First Amended Complaint alleged that his former counsel did not understand that the $360,000.00 settlement was not valued in that amount, and that it was only worth $12,000.00: "the parties were expecting" that the stock received would be worth $360,000.00. (JA0013) Mr. Stieber further alleged: "That even as of the date of [his] receipt of this stock, [his former counsel], including specifically Defendant Taing, believed that this was in error and that [he] was entitled to the entire $360,000.00[.]" (JA0013) Further, the First Amended Complaint alleged that "it was not until the March 2, 2020

correspondence with counsel for Cumulus that Defendants learned that their advice to Plaintiff regarding the settlement and the value of the settlement with Cumulus was inaccurate, and that the settlement was worth far less than the $360,000.00 in cash that Plaintiff and Defendants were expecting;" (JA0014) and that his former counsel failed to "advise" him and that he did not "understand that he would only receive less than $12,000.00 in stock when the payment was actually made[.]" (JA0013)

B. <u>Mr. Stieber alleged that his former counsel did not seek to have the agreed upon settlement amount fully paid</u>.

Specifically, Mr. Stieber's First Amended Complaint alleged that his former counsel "failed to negotiate with Cumulus and/or Chubb in a manner which would have resulted in payment by Chubb for amounts in excess of the Claim retainer, despite Cumulus's bankruptcy;" (JA0012) that his former counsel "failed to take any action to recover the value of [his] claim against Cumulus from the Policy;" (JA0011) and that his former counsel "failed to consider the amount of the Claim retention as per the Policy in negotiating any final resolution to [his] claims against Cumulus[.]" (JA0011)

C. <u>Mr. Stieber alleged that there was an insurance policy covering his claim and that his former counsel failed to pursue that coverage in order to fund a settlement in which he would actually receive $360,000.00.</u>

Specifically, Mr. Stieber's First Amended Complaint alleged, in part, that his former counsel "failed to take any steps to discover whether or not Cumulus carried Employment Practices Liability Insurance (EPLI) or to seek relief from the bankruptcy court such as would allow Plaintiff to continue proceedings against Cumulus subject to the policy limits of any such EPLI carrier;" (JA0011) and that his former counsel "failed to discover, understand, or acknowledge that Cumulus was covered by an Executive Protection Portfolio Policy, No. 8248-0889 (the "Policy") for the Period July 31, 2017 to July 31 2018, with a limit of liability of $10 million, subject to a $350,000 per Claim retention[.]" (JA0011)

IV. CASES CITED BY APPELLEES IN SUPPORT OF DISMISSAL BASED ON SPECULATIVE ALLEGATIONS ARE NOT PERSUASIVE.

The Appellees cite several cases from the U.S. District Court for the District of Columbia wherein legal malpractice claims have been dismissed because the alleged damages are speculative. However, none of those cases is on point with the facts alleged in this case. In *Macktal v. Garde,* 111 F.Supp.2d 18, 22 (D.D.C. 2000), for example, a plaintiff brought a professional malpractice claim against former counsel, claiming that counsel had coerced him into accepting a settlement. The *Macktal* court recognized that there is no universal prohibition against former clients establishing malpractice claims based on failure to negotiate reasonable settlements: "Although a cause of action may exist under some circumstances

against an attorney for failure to negotiate a reasonable settlement of a case, plaintiff has given this Court no authority which would allow an attorney to be sued for lost settlement value in a case which could not have been won on the merits." *Id.* at 22. Unlike *Macktal*, there is no dispute that Mr. Stieber's underlying claim was meritorious, and Mr. Stieber does not complain about agreeing to settle for $360,000.00; he complains that his counsel negligent failed to obtain the agreed-upon financial settlement.

In *Estate of Yel Botvin v. Nudelman,* 2022 WL 18024714 *3 (D.D.C. Dec. 12, 2022), the Court explained that plaintiffs "failed to present, or even gesture to, evidence supporting their theory" that former counsel could have secured a judgment more expeditiously. Unlike that case, Mr. Stieber has alleged facts to support his claim that he would have fared better if his former counsel had pursued the insurance policy that covered his claim and/or understood the bankruptcy implications.

In *Venable LLP v. Overseas Lease Group, Inc.*, 2015 WL 4555372 *3 (D.D.C. July 28, 2015), that same Court dismissed a counterclaim for legal malpractice where the former client claimed that its former counsel "fail[ed] to prepare for and effectively participate in settlement discussions" and, as a result, it accepted a settlement of $4 million instead of $10 million. Yet, the Court did not dismiss the claim because this, in and of itself was speculative. Instead, the Court

dismissed the claim but because it determined that "none of the alleged damages logically flow from any acts of Venable, but instead from OLG's voluntary decision to settle its claims …. [i]n fact, OLG accepted the settlement offer that it now claims was the product of inadequate representation after it had already fired Venable and initiated a suit in New York against Venable …."

In *Belmar v. Garza (In re Belmar),* 319 B.R. 748 (Bankr. D.D.C. 2004), the Court entered summary judgment for former counsel after plaintiffs brought a legal malpractice claim, alleging, in part, that counsel failed to file a timely opposition to a motion to lift a bankruptcy stay. The parties agreed that the plaintiffs lost leverage in settlement negotiations once the motion to lift stay was granted. The plaintiff's theory was that during the time between what should have been a timely-filed opposition and a hearing on the motion to lift stay, the plaintiff could have reached a favorable settlement but, because no timely opposition was filed, they lost that "leverage." The Court explained that this "theory of harm asks this court to engage in pure speculation as to what might have happened to the [plaintiffs] had they retained greater 'leverage' vis-à-vis Conti up until and/or during the hearing on Conti's Lift Stay Motion." *Id.* at 758-59.

Unlike these cases, Mr. Stieber is not asserting speculative claims, without any evidence, to support a theory that a better settlement could have theoretically been reached. He has identified a ten-million dollar insurance policy that covered

his claim, which his counsel wholly failed to pursue and which was wholly ignored in connection with the settlement that was reached. Importantly, Mr. Stieber's own counsel understood that he was to receive $360,000.00 in settlement funds from Cumulus. His counsel could have pursued the insurance proceeds or otherwise structured the settlement so that Mr. Stieber would actually receive $360,000.00 in settlement. This is not a theoretical, speculative hypothetical where Mr. Stieber is now having buyer's remorse and guessing that a better settlement could have been reached.

V. FACTS PLED BY MR. STIEBER DO NOT REQUIRE SPECULATION

In their Brief, Appellees repeatedly argue that there are several layers of supposed "speculation" in which a fact-finder would have to engage in order to determine that their negligence resulted in damage to Mr. Stieber. Not one of these is persuasive. As shown herein, each is a fact that could be reasonably deduced or inferred by a fact-finder; none require pure speculation.

A. No More "Favorable" Settlement Required

First, Appellees argue that, in order to be entitled to relief, Mr. Stieber would have to show that Cumulus would have been willing to pay more money to him to settle. (Brief of Appellee, pp. 1, 6, 13-16) Mr. Stieber has not alleged that, but for his former attorney's negligence, he would have recovered *more than* $360,000.00. He has alleged that because of his former attorneys' negligence, he

did not recover the agreed upon $360,000.00. His specific claims are that his former counsel failed to structure the terms of the settlement so that he would receive the agreed upon amount. Thus, in order to determine that his former counsel's negligence caused him damage, no fact finder would have to speculate as to whether Cumulus would agree to settle for more than that amount.

B. No Bankruptcy Approval of the Settlement Terms Required

Second, Appellees claim that, in order to be entitled to relief, Mr. Stieber would have to show that the Bankruptcy Trustee and the U.S. Bankruptcy Court would have approved a greater settlement. (Brief of Appellee, pp. 1, 6, 16) This completely ignores that Mr. Stieber's claim, being covered by an insurance policy, would, as a matter of course, be excepted from the bankruptcy proceeding.

As set forth in Appellant's opening brief, bankruptcy courts routinely allow liability claims to proceed against a debtor when there is insurance coverage to cover the loss. (Brief of Appellant, p. 14-18) *See also* Insurance Policy Holder Issues in Bankruptcy, Practical Law Practice Note Overview, W-034-0340 ("A lift-stay motion to pursue insurance proceeds typically does not draw an objection because a grant of relief usually ends the movant's involvement in the bankruptcy case with no downside for the debtor.") Based on the applicable law and facts alleged, a fact-finder could reasonably deduce or infer that if such a lift-stay motion had been asserted, it would have been granted as a matter of course.

Once a claim has been approved to proceed outside of the Bankruptcy Court, to the extent of available insurance coverage, there is nothing for that Court to approve with respect to the settlement of that claim. The whole point is that lift-stay motions are approved because insurance policy proceeds are not considered part of a debtor's estate when the proceeds are payable to a third-party, *i.e*., Mr. Stieber, and not the debtor. *See XL Specialty Ins. Co. v. Lakian,* 243 F.Supp.3d 434, n.8 (S.D. N.Y. 2017) ("[A]n insured's liability policy is generally not an asset of the insured's bankruptcy estate.") Again, this is a provision that is typically included in the liability policy itself, that "bankruptcy or insolvency of any insured shall not relieve the Company of its obligations nor deprive the Company of its rights or defenses under the policy." Assuming that the Chubb policy includes such a provision, a settlement funded by insurance proceeds would not require Bankruptcy Court approval. Moreover, it cannot be forgotten that the Bankruptcy Court already approved the $360,000.00 settlement. (JA023)

C. No Additional Money Needed to Be Recovered From Cumulus

Third, Appellees claim that, in order to be entitled to relief, Mr. Stieber would have to show that Cumulus would have actually paid him more than $12,000.00. (Brief of Appellee, pp. 1, 6, 16) This is not so. The Appellees refuse[1]

[1] Amazingly, Appellees argue that a case cited by Appellant in his opening Brief, *In re Vanderveer Estates Holding, LLC),* 328 B.R. 18 (Bankr. E.D.N.Y. 2005) "affirm[s] the principle that a bankrupt policyholder still has to pay its SIR before coverage liability

to acknowledge the well-established law that, even with SIRs (self-insured retentions), liability insurers are not relieved of their coverage obligations: "The majority rule is that irrespective of state law, the Bankruptcy Code requires an insurer to provide coverage for liability in excess of the deductible or SIR and up to the coverage limits regardless of whether an insolvent insured satisfied amounts owing under the deductible or SIR. Indeed, some states have even enacted statutes providing that failure of an insured to pay amounts owed does not relieve the insurer from its coverage obligations." Richard L. Epling, Kerry A. Brennan &

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attaches." (Brief of Appellees at p. 29) This is just wrong. Appellees quote that opinion's description of the terms of the insurance policy at issue in that case and misleadingly imply that it is the Court's analysis. In fact, that Court, after describing the terms of the insurance policy as set forth by the Appellees, further explains:

> To the contrary, case law interpreting § 365 of the Bankruptcy Code makes it clear that even in the absence of an applicable statutory provision such as § 5/388, the failure of a bankrupt insured to fund a self-insured retention does not relieve the insurer of the obligation to pay claims under the policy. This is so because where (as in this case) an insured debtor has paid the policy premium in full, the insurance policy is not an executory contract for purposes of § 365 of the Bankruptcy Code, even where the debtor has continuing obligations, such as the payment of a self-insured retention, a deductible, or a premium. Failure of the debtor to perform these continuing obligations does not excuse the insurer from performance under the contract, but gives rise to an unsecured claim by the insurer for any damages incurred by reason of the debtor's breach of the policy. In short, courts interpreting § 365 of the Bankruptcy Code have made it clear that, for purposes of that provision, the debtor's payment of the policy premium constitutes substantial compliance with its contractual obligations.

Id. at 25.

Brandon Johnson, "Intersections of Bankruptcy Law and Insurance Coverage Litigation," Norton Journal of Bankruptcy Law and Practice, Vol. 21, #1, p. 112 (2012). Their assertions that the Chubb policy could not be triggered as a result of Cumulus's bankruptcy are contrary to well-settled law. Indeed, counsel's musings on "basic insurance law" are entirely inapplicable when the insured has declared bankruptcy. (Brief of Appellee, pp. 20-22).

D. Whether Liability Policy Is Available Does Not Require Speculation

Fourth, Appellees claim that, in order to be entitled to relief, Mr. Stieber would have to show that the Chubb liability policy would have been "available." (Brief of Appellee, pp. 1, 6, 16) This is not an issue upon which one is required to speculate. The First Amended Complaint asserted that it was available. This is a fact which must be taken as true. A fact-finder can evaluate the truth of this assertion by review of the policy itself and applicable law. It does not require "speculation" so as to determine that Mr. Stieber failed to plead a claim that could *plausibly* entitle him to relief. Indeed, the entire argument that it is "speculative" is absurd.

VI. APPELLANT DID NOT WAIVE ANY ARGUMENT

The Appellees seek to prevent this Court from reaching certain merits of this appeal and argue that Mr. Stieber is somehow precluded from arguing that Cumulus's bankruptcy did not relieve Chubb of the obligation to pay claims under

the insurance policy that it issued to Cumulus. (Brief of Appellee, p. 23) It is understandable why Appellees do not want the Court to recognize this argument, as it is a death-knell for the underlying dismissal. However, the assertion that Mr. Stieber waived this argument is astoundingly incorrect.

Appellees cite to two cases from this Court for the general principle that an argument not presented to a trial court may not be presented on appeal, but the cases cited do not prevent this Court from considering that Mr. Stieber's counsel negligently failed to pursue insurance coverage for his claims. In *Hackney v. Chamblee*, 980 A.2d 427, 430 (D.C. 2009), this Court did not consider a husband's argument on appeal that he was denied the opportunity to challenge the reasonableness of attorney's fees assessed against him below. As this Court explained, the husband never challenged the request for attorney's fees below and, therefore, the Court considered that argument as waived. Similarly, in *Wallace v. Skadden, Arps, Slate, Meagher & Flom LLP,* 799 A.2d 381, 388 (D.C. 2002), this Court did not consider on appeal the appellant's argument that trial counsel's misconduct in the discovery process tainted the lower court proceedings and prejudiced his appellate rights. Again, this Court explained that the appellant had not raised those arguments "in any form in the trial court" and therefore considered them to have been waived.

In contrast, the single issue on appeal in this case is whether the Superior Court erred by dismissing Mr. Stieber's First Amended Complaint for failure to state a claim upon which relief could be granted. Mr. Stieber plainly alleged that his former counsel breached their duty of care by failing to pursue insurance coverage for his underlying claim. This is an issue that he raised below. Plainly, the above-cited case law does not preclude Mr. Stieber from arguing, on appeal, that the insurance policy was applicable to his claims against Cumulus.

VII. CONCLUSION

Appellant Stieber should have the opportunity to present evidence that his counsel was aware of, but failed to pursue or understand, the available insurance coverage or bankruptcy plan. Appellant should have the opportunity to show that the negligence caused him to suffer damages, including by presenting expert testimony. Mr. Stieber had the burden of proof and he is fully prepared to satisfy that burden. The Superior Court, however, removed that opportunity when it engaged in its own fact-finding analysis and decided that, as set forth in the First Amended Complaint, it would have to speculate about hypothetical bankruptcy court decisions in order to find causation. This was error.

Wherefore, for all of the foregoing reasons, and as more fully set forth in Appellant's opening brief, the Appellant, Jerome Stieber, respectfully requests that this Honorable Court reverse the dismissal of his First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 1st day of May, 2023, a copy of the foregoing Reply Brief of Appellant Jerome Stieber was electronically filed and delivered to:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Amy Leete Leone
Signature

22-cv-0599
Case Number(s)

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