Filed 12/23/15 Laibco, LLC v. Strapp & Strapp CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| LAIBCO, LLC,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>STRAPP & STRAPP et al.,<br><br>Defendants and Respondents. | B257646<br><br>(Los Angeles County<br>Super. Ct. No. BC466421) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Affirmed.

Dempsey & Johnson, Michael D. Dempsey and Rebecca A. Asuan-O'Brien for Plaintiff and Appellant.

Nemecek & Cole, Frank W. Nemecek, Mark Schaeffer and Jonathan M. Starre for Defendant and Respondent Strapp & Strapp.

Horvitz & Levy, Peter Abrahams, Frederic D. Cohen; Tisdale & Nicholson and Guy C. Nicholson for Defendant and Respondent Horvitz & Levy LLP.

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Appellant Laibco, LLC (Laibco) alleges that its former attorneys, respondents Strapp & Strapp and Horvitz & Levy LLP (Horvitz & Levy) committed legal malpractice in their representation of Laibco in an earlier lawsuit. In that earlier case, a jury found Laibco liable for wrongful termination of a former employee. The trial court issued a ruling in which it purported to grant Laibco's motion for a new trial, but the court's ruling was filed one day after the 60-day deadline established under Code of Civil Procedure section 660 and was therefore ineffective. Laibco sued Strapp & Strapp and Horvitz & Levy, contending that the firms were negligent in failing to remind the court of the deadline, and in failing to recognize that the court had issued a late ruling on the new trial motion quickly enough to allow Laibco to reach a more favorable settlement of the former employee's claims.

## FACTS AND PROCEEDINGS BELOW

### I. *The Underlying Green Lawsuit*

Laibco owns and operates the Las Flores Convalescent Hospital, a nursing home in Gardena. In 2007, Teresa Green, a former employee at the hospital, sued Laibco for wrongful termination, alleging that she had been fired for refusing to lie to a state investigator regarding the circumstances in which a patient at the hospital suffered burns while smoking cigarettes, and for complaining about patient care and safety and about the sexual harassment of one of her colleagues. (*Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 443-444 (*Green*).) Strapp & Strapp represented Laibco through trial, after which a jury awarded Green more than $2.4 million, including more than $1.2 million in punitive damages. (*Id.* at pp. 445-446.) Under the Fair Employment and Housing Act, Government Code section 12940, Laibco was also liable for Green's attorney's fees. (*Id.* at pp. 454-456.) Laibco continued working with Strapp & Strapp, and also retained Horvitz & Levy to advise it with respect to post-trial proceedings and to handle the case on appeal.

On September 19, 2008, Strapp & Strapp filed a notice of intention to move for a new trial on behalf of Laibco. It also filed a motion for judgment notwithstanding the verdict on the punitive damages award. Under Code of Civil Procedure section 660,

a trial court has 60 days from the date of the mailing of notice of entry of judgment or the notice of intent to move for a new trial within which to issue a ruling. "If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court." (*Ibid.*) At a hearing on October 27, the court issued a tentative ruling granting Laibco's motion for judgment notwithstanding the verdict on punitive damages, but indicating that it needed additional time to decide the motion for a new trial.

On November 18, Green's attorney filed a document reminding the court that it had not yet ruled on the pending motions. The next day, November 19, the court filed its ruling granting the motion for a new trial and denying the motion for judgment notwithstanding the verdict as moot. Subsequent email correspondence indicated that Strapp & Strapp and Horvitz & Levy believed the court's decision to award a new trial was likely to be upheld on appeal.

In her appeal, Green argued that the trial court's grant of the motion for a new trial was ineffective because it was not filed within the 60-day period established in Code of Civil Procedure section 660. Neither Strapp & Strapp nor Horvitz & Levy realized that the court's new trial order had been issued late until reading Green's opening brief on appeal. Division 8 heard the case on appeal and overturned the trial court's order of a new trial on the ground it was untimely, while affirming the judgment, including the award of punitive damages. (*Green, supra,* 192 Cal.App.4th at p. 443.) Later, the parties agreed to settle the case for $1,238,000, approximately the same amount the jury had granted in compensatory damages, but excluding the punitive damages award and potential attorney's fees and interest.

II. *The Malpractice Suit*

In July 2011, Laibco filed this case against Strapp & Strapp and Horvitz & Levy, alleging legal malpractice. Laibco's complaint alleged that both Strapp & Strapp and Horvitz & Levy had breached their duty of care to Laibco by failing to take action to ensure that the trial court issued its ruling on the new trial motion on time. Laibco also claimed that defendants' negligence in failing to recognize and warn Laibco that the new

trial motion had been filed late, denied it the opportunity to settle the case more favorably.

Strapp & Strapp demurred and moved to strike some of Laibco's allegations on the grounds that it had no duty to remind the court to issue a timely ruling, and that it was powerless to require the court to file its ruling within the time prescribed by Code of Civil Procedure section 660. The trial court granted the motion, striking those allegations from the complaint.

The case proceeded to trial on the remaining allegations, relating to Laibco's claim that defendants had failed to recognize the lateness of the new trial ruling and advise it to settle the matter quickly. A jury returned a special verdict in favor of Strapp & Strapp and Horvitz & Levy, denying Laibco any recovery.

## DISCUSSION

Laibco raises two arguments on appeal. First, it contends that the trial court erred when it struck the allegations that defendants failed to meet their duty of care to Laibco when they failed to remind the trial court of the deadline for issuing a ruling on the motion for a new trial. Next, Laibco claims that the trial court abused its discretion when it granted defendants' motions in limine to exclude evidence from trial. We disagree with both of Laibco's arguments and affirm the judgment of the trial court.

### I. *Failure To Remind The Trial Court Of The Deadline*

In its complaint, Laibco contended that Strapp & Strapp violated its fiduciary duty to Laibco by failing to remind the court of the November 18 deadline to rule on the motion for a new trial. The trial court struck those allegations. Of course, attorneys do not have a duty to supervise the court, nor to remind the court in every case of impending deadlines. To hold otherwise would unleash an overwhelming wave of useless reminder calls and letters from lawyers to court clerks and chambers.

Nevertheless, Laibco contends that under the specific facts of this case, Strapp & Strapp's duty of zealous advocacy on behalf of its client required it to remind the court of the deadline to rule on the motion. A lawyer owes his client the "duty to use the care and skill ordinarily exercised in like cases by reputable members of the

profession . . . and . . . to use reasonable diligence and his best judgment." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 984, fn. 9.) Laibco points out that in some cases, courts have held that this duty requires attorneys to anticipate and protect their clients from foreseeable error by the court. Thus, in *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656 (*Lombardo*), a court overseeing a trust established by a man under conservatorship entered an order stating, "'[d]uring the pendency of these proceedings, the conservatee shall not have the power either to amend or to revoke [t]he [t]rust . . . without the prior approval of this Court.'" (*Id*. at p. 660.) The conservatee subsequently obtained a lawyer to amend the trust. (*Ibid.*) The lawyer drew up the amendments, and the conservatee signed them, but then died before the lawyer submitted them for court approval. (*Id*. at pp. 661-662.) The court ruled that the amendments were invalid because they had been executed without prior court approval. (*Id*. at p. 662.) The parties that would have benefited from the amendments to the trust appealed the court's ruling, but while the appeal was pending, they settled the case with the existing trustee and beneficiary. (*Ibid.*) They then sued the attorney who failed to submit the amendments for professional negligence. (*Ibid.*)

The trial court granted the attorney's motion for nonsuit, finding that a reasonable court would have held a hearing before invalidating the amendments, and that because the court erred by not doing so, there was "'no causal connection between the conduct of the Defendant and the Plaintiffs' alleged damages.'" (*Lombardo*, *supra*, 91 Cal.App.4th at p. 663.) The Court of Appeal disagreed and reversed the trial court. It held that, if the trial court erred in invalidating the amendments without a hearing, that error was foreseeable from the terms of the court's order. (*Id*. at pp. 667-668.) An attorney could be held liable for failing to anticipate the court's ruling and protect his client from it. (*Id*. at pp. 668-669.)

Similarly, in *Skinner v. Stone, Raskin & Israel* (2d Cir. 1983) 724 F.2d 264 (*Skinner*), a federal appeals court interpreting New York law held that a law firm could be liable for a default judgment that a court erroneously entered against its client. Although the court itself was largely responsible for issuing the default judgment without

ensuring that the notice requirements were met, the client's attorneys may have been a contributing cause because they were aware of the impending default and failed to take steps to prevent it. (*Id*. at pp. 265-266.)

We need not decide whether an attorney could ever be held liable for failing to remind the court of the court's own deadline, because Laibco presented insufficient evidence to show that Strapp & Strapp was the proximate cause of Laibco's injury. As in any other negligence action, a plaintiff alleging legal malpractice must show not only that the defendant's action or inaction was the actual cause of the plaintiff's injury, but that the injury was reasonably foreseeable. """[W]here there is an independent intervening act which is not reasonably foreseeable, the defendant's conduct is not deemed the 'legal' or proximate cause."""" (*Lombardo, supra,* 91 Cal.App.4th at p. 666.) In cases where attorneys have been held liable for failing to anticipate court errors, the attorneys had ample reason to foresee and respond to the error. Thus, in *Lombardo,* the court had issued an order requiring prior approval of the court before the conservatee could amend the trust. (*Id*. at p. 660.) Even if the attorney believed that the law allowed the trust to be amended without prior approval, he had every reason to protect his client from the court's error by submitting the amendment to the court for approval. In *Skinner, supra,* 724 F.2d at pp. 265-266, the attorneys had been informed that the court intended to enter an erroneous default judgment and could have taken steps to prevent it.

The only evidence Laibco cites to prove that Strapp & Strapp should have been able to anticipate the missed deadline came from an exchange at the hearing regarding the new trial motion. The Strapp & Strapp attorney representing Laibco stated, "As the court knows, the court has 60 days from the time we filed our notice of intention to move for new trial to make a ruling. That would take it up to November 18." The court responded, "I thought I had 60 days from entry of judgment?" The attorney replied, "Well, I've read that, and I've read the notice of motion for new trial." The court then stated, "Okay. So you're saying that I have 60 days from the filing of the motion for new trial." The attorney replied, "That's what I read yesterday. I—it could be one or the other. I'm not sure which. I know that. I can double-check." According to Laibco, the

court's uncertainty, coupled with the offer to double-check the due date, should have put Strapp & Strapp on notice of the possibility of a missed deadline.

Laibco's argument ignores, however, the exchange that followed almost immediately afterward. The court stated, "I thought I had 60 days from the entry of judgment which apparently was on October 14. You're telling me I had 60 days from . . . the filing of the motion for new trial, which you say will expire on November 16; is that correct?" The Strapp & Strapp attorney replied, "November 18, I believe, Your Honor." The court replied, "November 18. Well, I certainly hope that I can rule upon this before November 18." With this statement, the court indicated clearly that it understood the deadline to be November 18.

In general, causation is a question for the jury. But if "reasonable minds could not dispute the absence of causation," a trial court may rule on the issue as a matter of law. (*Lombardo*, *supra*, 91 Cal.App.4th at p. 666.) In this case, there was insufficient evidence of foreseeability to present a jury question. By stating that it hoped to rule by November 18, the trial court removed any reason Strapp & Strapp might have had to "double-check" the due date or to doubt that the court would meet the deadline for granting a new trial. As a matter of law, the court's failure to file its new trial order on time was not foreseeable, and operated as a superseding cause that excused Laibco's attorneys from any liability for failing to remind the court of the deadline. The trial court did not err by striking the reminder allegations from the complaint.

II. *Motions In Limine*

Prior to trial, Horvitz & Levy and Strapp & Strapp filed several motions in limine to exclude evidence. Laibco challenges the trial court's rulings granting three of these motions. In motion in limine No. 1, Horvitz & Levy sought to bar evidence that it fell below the standard of care by raising unsuccessful arguments on appeal in the *Green* action. In motion in limine No. 2, both Horvitz & Levy and Strapp & Strapp argued that certain evidence was inadmissible because it pertained to Laibco's claims that its attorneys owed a duty to remind the court of the new trial deadline. Finally, in motion in limine No. 4, Strapp & Strapp sought to exclude evidence that it had been negligent in the

time leading up to the verdict in the *Green* action. We reject all of Laibco's contentions and affirm the trial court in granting these motions.

A. *Motion in Limine No. 1*

When representing Laibco on appeal in the underlying case, Horvitz & Levy argued that Green was not entitled to punitive damages because she had not introduced sufficient evidence of Laibco's ability to pay. The court was not persuaded. It held that the contention was meritless, and went on to state, "we cannot leave this subject without comment on what may be described colloquially as defendant's chutzpah in insisting that plaintiff failed to meet her burden to prove defendant's financial condition. The notion that the jury did not have necessary information about defendant's net worth because plaintiff did not move defendant's financial statements into evidence—statements which defendant's own CEO could not read—is the height of absurdity. The jury did not have information about defendant's net worth because defendant's CEO engaged in stonewalling, pure and simple, from beginning to end." (*Green v. Laibco, LLC, supra*, 192 Cal.App.4th at p. 453.)

In its complaint in this case, Laibco contended that Horvitz & Levy fell below the standard of care in the underlying case by raising the argument on Laibco's financial condition. In motion in limine No. 1, Horvitz & Levy argued that Laibco should not be allowed to introduce evidence pertaining to this contention. Horvitz & Levy noted that in response to an interrogatory, Laibco admitted that it did not contend that the Court of Appeal in the underlying case would have reached a more favorable result with respect to punitive damages if not for Horvitz & Levy's alleged mistakes. At a hearing on this motion, Laibco stated that it did not intend to introduce evidence that Horvitz & Levy fell below the standard of care with respect to the punitive damages issue. On this basis, the trial court granted Horvitz & Levy's motion.

Laibco now argues that the court erred by granting motion in limine No. 1 because it rendered Laibco "unable to present evidence or argument that Horvitz & Levy fell below the standard of care by failing to recognize the new trial order was void and by encouraging Laibco to pursue a hopeless appeal." But motion in limine No. 1, by its own

terms, was confined only to the argument regarding Laibco's financial condition, and had nothing to do with the new trial motion. When it conceded at the hearing that it did not intend to raise an argument regarding the punitive damages award, Laibco forfeited any argument on this point on appeal. (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 890, fn. 3 ["failure to object in the trial court waives any challenge to the evidence on review"].)

B. *Motion in Limine No. 2*

Horvitz & Levy filed motion in limine No. 2 to prevent Laibco from introducing evidence relating to the allegations that Strapp & Strapp and Horvitz & Levy failed to advise or remind the court of the deadline for the new trial. The court had stricken those allegations from Laibco's complaint. Because the trial court did not err by striking those allegations, it did not err by granting motion in limine No. 2.

C. *Motion in Limine No. 4*

Finally, the trial court also granted motion in limine No. 4, in which Strapp & Strapp sought to exclude evidence of alleged negligence predating the jury verdict. In its opening brief on appeal, Laibco concedes that this decision alone did not make enough difference in the case to warrant reversal. Because we have held that the court did not err with respect to Laibco's other claims, even if it did err with respect to motion in limine No. 4, any error would have necessarily been harmless.

## DISPOSITION

The judgment is affirmed. Each party to bear its own costs.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.