74024-5

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No. 74024-5-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Roland Killian & Dennis Bailey, Appellants

v.

International Union of Local Operating Engineers, Local 609-A,
Defendant.

REPLY BRIEF OF APPELLANTS

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I. SUPPLEMENTAL STATEMENT OF THE CASE

A. Defendant Union's Motion for Summary Judgment raised only the argument that Plaintiffs' claims were barred by a six month statute of limitations.

With the exception of the order denying Plaintiffs' Motion to Amend the Complaint, this appeal is based upon a trial court's order entered on Defendant Union's Motion for Summary Judgment. CP 966-968 & 971-973. Defendant Union's Motion for Summary Judgment is entitled "Defendant IUOE Local 609's Summary Judgment Motion Based on Statute of Limitation". CP 32. Defendant Union identified the issue for resolution by the trial court as, "[s]hould this Court enter summary judgment in favor of Local 609 on Plaintiffs' claims where they were filed past the statute of limitations and are now time barred." CP 35. Defendant Union never raised an argument that Plaintiffs did not have sufficient evidence to support any of Plaintiffs' claims in its' summary judgment motion and that issue was never before the trial court. *See* CP 36-41.

In its' brief, Defendant Union argues, "[r]egardless of the six month statute of limitation's period, this Court also should affirm because Plantiffs' duty of fair representation claims are governed by a highly deferential standard that requires Plaintiffs to provide the Union acted arbitrarily, discriminatorily, or in bad faith-a standard they did not meet." Respondent's Brief, pgs. 27-39.

This issue was not before the trial court in Defendant Union's Motion for Summary Judgment. *See* CP 32-42.

B. The PERC's mediator, Ms. Ramerman, did not testify in this case or offer testimony by way of declaration.

In several places in its brief, Defendant Union states that Mr. McBee and the mediator (the PERC's mediator), told Plaintiffs to discuss the settlement offer with their attorney. Respondent's Brief pgs. 5 & 7, fn. 4. This was alleged by Mr. McBee and is self-serving hearsay. *See* CP 383 (183:19-184:17). No employee for PERC's ever offered any type of testimony in this case.

Both Plaintiff Killian & Plaintiff Bailey were assured by Mr. McBee that the mediation would not include resolution of their civil claims. CP 372 (Dep. McBee, pgs. 142:6-143:11), CP 163, CP 193-194 & CP 431 - 433. This was reinforced by statements made by counsel for Defendant Union. CP 431 - 433.

II. SUPPLEMENTAL ARGUMENT

A. Defendant Union has raised issues outside of the scope of the summary judgment motion addressed by the trial court in violation of RAP 9.12 - those arguments should be stricken.

RAP 9.12 provides, "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider *only* evidence and *issues called to the attention of the trial court.*" (emphasis added). *See also Sourakli v. Kyriakos,* Inc. 144 Wn. App. 501, 509 (2008) (citing RAP 9.12 as basis for declining to consider argument not made to the trial court), *review denied*, 165 Wn.2d 1017 (2009); *Coronado v. Orona,* 137 Wn. App. 308, 318 (2007) (RAP 9.12 limits appellate court's review to issues brought to the trial court's attention).

Defendant Union's motion for summary judgment requested the trial court dismiss Plaintiffs' claim based upon the statute of limitations. CP 32-42. Defendant Union did not argue that Plaintiffs' did not have sufficient evidence to support their claims. Because of this, Plaintiffs did not address this issue or offer evidence to do so. RAP 9.12 is clear, Defendant Union cannot on appeal raise an issue not before the trial court. Further, it is rather remarkable that Defendant Union would argue that Plaintiffs did not produce sufficient evidence to establish their claims when Plaintiffs never had the opportunity to

do so below. Plaintiffs request the Court strike the arguments raised by Defendant Union contained at pages 27 through 30 of their brief.

B. Case law cited by Defendant Union arguing that the DFR consumes all claims for legal malpractice is not applicable to this case.

Defendant Union cites to a number of cases that have held a legal malpractice claim brought against a union attorney for representation of a union member in a grievance was in fact a DFR claim. *See Weiner v. Beatty*, 121 Nev. 243, 249-50 (2005); *Brown v. Maine State Employees Ass'n,* 690 A.2d 956, 960 (1997); *Peterson v. Kennedy*, 771 F.2d 1244, 1255 (9th Cir. 1985), *cert. denied* 475 U.S. 112 (1986) (holding an attorney hired by a union was immune from suit pursuant to the Atkinson Rule barring individual claims against union officials for acts undertaken on behalf of the union). All of these cases involved suits against licensed practicing attorneys who were hired by a union to represent a member. *Id.* None of these cases involved a lay person engaging in the unauthorized practice of law. Defendant Union's argument would allow any union representative to engage in legal malpractice and be provided the shield of the application of a 6 month statute of limitations. No other individual or institution is afforded this type of benefit and the law in the state of Washington provides for a three year statute of limitations on claims

for the unauthorized practice of law. RCW 4.16.080(2). The unauthorized practice of law is a crime. RCW 2.48.180(3). It is not simply a negligence claim. Defendant Union's conduct was a violation of the law and, as admitted by Mr. McBee, outside of the scope of the CBA.

Further *Peterson v. Kennedy,* 771 F.2d 1244 (1985) is not applicable in this case. Peterson involved the application of the National Labor Relations Act (NLRA). *Id.* at 1251. Finding the claim predated the application of the six month statute of limitations imposed by the federal statute, the Court applied the state statute of limitations of three years. *Id.* at 1251-1252. In addressing the issue of whether the attorney hired by the union could be sued individually for malpractice, the Court explained, ". . . attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services the attorneys perform constitute a part of the collective bargaining process." *Id.,* at 1256. The Court goes on to explain that the holding in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), "that union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process." *Id.* at 1256. That is not the issue before this court.

As explained in *Canez v. Hinkle*, 2000 U.S. App. Lexis 13228, *3 (2000), ". . . a union attorney is immune form a malpractice action when the

attorney's advice is in connection with the collective bargaining process and thus within the scope of the national labor relations laws." *citing Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985); (*Canez* is an unpublished opinion, copy attached pursuant to FRAP 32.1 & RAP 14.1(b)). In Hinkle the court found the attorneys actions were wholly unrelated to the collective bargaining process when the attorney gave *Hinkle* advice about taking a loan from the union. *Id.* While the conduct alleged in this case may have occurred in part during a mediation, it had nothing to do with actions taken within the scope of the applicable collective bargaining process because the actions were outside of the authority granted by the CBA. Separate and distinct from Plaintiffs' claims for violation of the duty of fair representation that relate to the processing of their grievance under the CBA, Plaintiffs have a cause of action for conduct taken outside the scope of the CBA and not subject to a limited statute of limitations. Further, *Peterson* recognizes that DFR claims arising under state law have different applicable statute of limitations. In this case Washington has adopted an applicable two year statute of limitations as argued below.

C. Plaintiffs' should be allowed to move forward and amend their complaint to include a CPA claim.

1. Plaintiffs' claim for violation of Washington's Consumer Protection Act is not time barred and not a DFR claim.

For the same reasons set out above relating to the claim for the unauthorized practice of law, a claim brought under the Washington Consumer Protection Act should not be found as subsumed into a DFR claim. Plaintiffs' CPA claims are based upon and founded in the same facts that give rise to their unauthorized practice of law claims. It is for unlawful conduct engaged in that is outside of the scope of the CBA. RCW 19.86.120 provides for a four statute of limitations on claims for damages brought under Washington's CPA.

2. The trial court denied Plaintiffs' motion to amend finding the 6 month statute of limitations applied to a CPA claim - it did not find Defendant Union would be unfairly prejudiced by the amendment.

The trial court denied Plaintiffs' motion to amend the complaint because it found any CPA claim would be barred by the six month statute of limitations. CP 971-973. The trial court did not deny Plaintiffs' motion due to undue delay or unfair prejudice to Defendant Union.

Regardless, pursuant to CR 15(a) after a responsive pleading is filed, " . . . a party may amend his pleading only be leave of court or by written

consent of the adverse party. . ." Further, the rule provides, "leave shall be freely given when justice so requires." Amendments are freely granted unless the opposing party would be prejudiced. *See Olson v. Roberts & Schaeffer Co.*, 25 Wn. App. 225 (1980). Generally the test is whether the opposing party is prepared to meet the new issue. *Quackenbush v. State,* 72 Wn.2d 670 (1967). If no prejudice is evident, then an amendment may be granted even after substantial delay. *Caruso v. Local Union No. 690, Intern. Brotherhood of Teamsters*, 100 Wn.2d 343 (1983).

Defendant argues that granting the motion to amend would cause it prejudice. The case sited by Defendant, *Donald B. Murphy Contractors, Inc. v. King County,* 112 Wash. App. 192, 199-200 (2002) is not applicable here. In that case the Court found the Defendant would have to disclose new witnesses and retain an expert. *Id.* Defendant alleges it would need to consider whether to retain an expert. However, Defendant must explain how it will be prejudiced. There is no explanation as to why it would need to disclose additional witnesses or possibly retain an expert. There is no support for this as the CPA claim is based upon the same facts that support the unauthorized practice of law claim. Defendant makes a blanket argument with no explanation as to why raising a CPA claim would result in additional

work on its part. It does not as all the facts have been known to Defendant, no new facts are raised, and Defendant has prepared for the defense of the unauthorized practice of law which gives rise to the CPA claim. Even if the Court found a 2 month delay significant, which Plaintiffs believe it is not, Defendant must show prejudice and has failed to do so.

D. The legislature's intent is what governs and there is no evidence that the legislature intended to apply a six month statute of limitations to a DFR claim filed under state laws.

When the legislature expresses one thing in a statute, "[o]mission are deemed to be exclusions." *In re Det. Of Williams* 147 Wn.2d 476, 491 (2002). Had the legislature intended to apply a six month statute of limitations to all civil claims for violation of a union's duty of fair representation brought in state court, it would have done so within the applicable statute. Washington has adopted a catch all provision providing for a two year statute of limitation on claims brought where no specific statutory limit applies. RCW 4.16.130. As explained by the Court in *Faber v. City of Paterson*, 440 F.3d 131, 144 (2006), ". . . we cannot circumvent a state legislature's decision to provide a general catch-all statute of limitations for a tort claims, and thus may not borrow the six-month limitations period." Adoption of the six month statute of limitation by Division Three in *Imperato* was in error. Had the legislature

intended a Union should be provided the benefit of a lesser statute of limitations than what was already set out in statute, it could have done so. In addition, sound policy reasons support application of the two year statute of limitations.

III. CONCLUSION

For the reasons stated above and included in Plaintiffs' original brief, Plaintiffs request the Court find as set out above and remand this case back for trial.

Dated this 13th day of April, 2016

Respectfully submitted,

/s/Chellie Hammack
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Certificate of Service

I, Chellie Hammack, attorney for Appellants, certify that on April 13, 2016, I placed a true and correct copy of the Appellant's Reply Brief and this Certificate of Service for hand delivery via legal messenger service and/or for delivery by email to:

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DATED this 13th day of April, 2016

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Appendix A

Canez v. Hinkle

United States Court of Appeals for the Ninth Circuit

November 1, 1999; January 28, 2000, Filed

No. 98-16602

Reporter
2000 U.S. App. LEXIS 1391

FRANK CANEZ, Plaintiff - Appellant, v. BARRY E. HINKLE; VAN BOURG, WEINBERG, ROGER & ROSENFELD, A California legal partnership and a professional corporation, Defendants - Appellees.

Notice: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *2000 U.S. App. LEXIS 13228*.

Prior History: Appeal from the United States District Court for the District of Arizona. D.C. No. CV-96-00131-ROS. Roslyn O. Silver, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

attorney-client, advice, malpractice, district court, national labor, relations law, immune

Case Summary

Procedural Posture
Plaintiff appealed from the United States District Court for the District of Arizona, which granted a motion for summary judgment in favor of defendants, an attorney and a legal partnership, and refused to certify to the Arizona Supreme Court the issue whether there was an attorney-client relationship.

Overview
Plaintiff sued defendant attorney and his law firm for legal malpractice, summary judgment was granted in favor of defendants, and this appeal followed. Defendant attorney's advice was unrelated to collective bargaining process, thus plaintiff's claim was not within scope of national labor relations laws and defendants were not immune from suit. Because Arizona law was clear, and because question whether there was an attorney-client relationship depended on factual determination, district court did not err in denying certification. However, a factual issue existed regarding whether defendant attorney acted as plaintiff's attorney. There was a genuine issue of material fact as to issue regarding whether plaintiff's failure to sign an IOU was an unforeseeable, extraordinary, intervening force that broke chain of causation between defendant's alleged malpractice and plaintiff's termination. Summary judgment was therefore improper.

Outcome
Judgment reversed and remanded. Proximate cause issue presented a question of fact to be resolved by the factfinder. Summary judgment was improper because defendant attorney was not immune from suit and there were genuine issues of material fact. Denial of certification was not error.

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN1 When a claim is within the scope of national labor relations laws, individual union members are immune from suit pursuant to *29 U.S.C.S. § 185(b)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Torts > Malpractice & Professional Liability > Attorneys

HN2 A union attorney is immune from a malpractice action when the attorney's advice is in connection with the collective bargaining process and thus within the scope of national labor relations laws.

Torts > Procedural Matters > Attorney-Client Relationships

HN3 Under Arizona law, in determining whether there was an attorney-client relationship, a factfinder looks at the nature of the services rendered, the circumstances under which the individual divulges confidences, and the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice. The client's belief that an attorney-client relationship existed is an important factor.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 We review for abuse of discretion a district court's decision to deny certification to the highest state court.

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Attorneys

HN5 Arizona law provides as a matter of public policy that a third party may sue an attorney for malpractice to the attorney's client when that malpractice injures a third party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN6 Appellate courts review for abuse of discretion a district court's decision to exclude evidence.

Torts > ... > Causation > Proximate Cause > General Overview

HN7 Under Arizona law, proximate cause exists even if defendant's conduct contributes only a little to plaintiff's damages, if the damages would not have occurred but for that conduct.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > Intervening Causation

HN8 A superseding cause may relieve the defendant of liability only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary.

Counsel: For FRANK CANEZ, Plaintiff - Appellant: Richard T. Treon, Esq., Michael DePaoli, TREON STRICK LUCIA & AGUIRRE, Phoenix, AZ.

For BARRY E. HINKLE, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Defendants - Appellees: D. Samuel Coffman, Michael S. Rubin, Esq., MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, Phoenix, AZ.

Judges: Before: CANBY, THOMPSON, and GRABER, Circuit Judges.

Opinion

MEMORANDUM [1]

Frank Canez sued Attorney Barry E. Hinkle and the law firm that employed him, Van Bourg, Weinberg, Roger & Rosenfeld, for legal malpractice. **[*2]** The district court granted the defendants' motion for summary judgment, holding that (1) Hinkle was immune from suit under § 301 of the National Labor-Management Relations Act, (2) there was no attorney-client relationship between Hinkle and Canez under Arizona state law, (3) Hinkle could not be liable for negligence if there was no attorney-client relationship, (4) a hearing panel's findings were inadmissible hearsay, and (5) there was no proximate cause between Hinkle's alleged bad advice and Canez's firing. The district court also refused to certify to the Arizona Supreme Court the issue whether there was an attorney-client relationship. Canez appeals. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse and remand for further proceedings.

DISCUSSION

I. Section 301 of The National Labor-Management Relations Act

In *Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962), overruled on other grounds, Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970)*, the Supreme Court held that ***HN1*** when a claim is within the scope of national **[*3]** labor relations laws, individual union members are immune from suit pursuant to *29 U.S.C. § 185(b)*. *See id. at 246*. After *Atkinson*, we held that ***HN2*** a union attorney is immune from a malpractice action when the attorney's advice is in connection with the collective bargaining process and thus within the scope of national labor relations

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

laws. *See Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985)*.

Unlike the present case, the attorney's services in *Peterson* were in connection with negotiations between the plaintiff/employee and his employer and therefore were part of the collective bargaining process that national labor relations laws control. By contrast, Hinkle's advice was "wholly unrelated to the collective bargaining process." It concerned whether Canez could take a personal loan from the union. As a result, Canez's claim for malpractice is not within the scope of national labor relations laws and Hinkle is not immune from suit on that ground. *See id. at 1259*.

II. Attorney-Client Relationship

HN3 Under Arizona law, in determining whether there was an attorney-client relationship, a factfinder **[*4]** looks at "the nature of the services rendered, the circumstances under which the individual divulges confidences, and 'the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'" *Foulke v. Knuck, 162 Ariz. 517, 784 P.2d 723, 726 (Ariz. Ct. App. 1989)* (citations omitted). The client's belief that an attorney-client relationship existed is an important factor. *See In re Petrie, 154 Ariz. 295, 742 P.2d 796, 801 (Ariz. 1987)*.

In the instant case, because Hinkle told Canez it would be legal for him to borrow money from the union, the nature of Hinkle's services was legal. In addition, Canez stated in his affidavit that he believed he and Hinkle had an attorney-client relationship because they had a long-standing personal relationship, Hinkle had represented Canez personally when he was sued as a Trustee, and Hinkle was available to union members who needed personal legal advice. Whether Canez is telling the truth and whether his belief was objectively reasonable are determinations properly left for the trier of fact. [2]

[*5] III. Certification to Arizona Supreme Court

HN4 We review for abuse of discretion a district court's decision to deny certification to the highest state court. *See Louie v. United States, 776 F.2d 819, 824 (9th Cir. 1985)*. Because Arizona law concerning the elements of an attorney-client relationship is clear, and because the question whether there was an attorney-client relationship in this case depends on a factual determination, the district court did not err in denying certification to the Arizona Supreme Court.

IV. Third-Party Liability

HN5 Arizona law provides as a matter of public policy that a third party may sue an attorney for malpractice to the attorney's client when that malpractice injures a third party. *See Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (Ariz. Ct. App. 1976)*. Here, a foundational question was in dispute: whether Hinkle acted as the union's attorney or Canez's attorney, or perhaps both, when he gave the advice to Hinkle. If the trier of fact should find that Hinkle acted as the union's attorney in giving the advice, then Arizona's public policy permitting suit by a third party (Canez) may apply **[*6]** if the trier of fact also finds causation of injury.

V. Admissibility of the Hearing Panel's Decision

HN6 We review for abuse of discretion a district court's decision to exclude evidence. *See Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir. 1999)*. Canez contends that the hearing panel's statement that, "under the constitutional practice of this Union, it is improper for a union officer to loan himself or herself union funds," is not inadmissible hearsay because it is a statement of law and not a statement of fact and thus was not offered to prove the truth of the matter asserted. Alternatively, Canez argues that *Federal Rule of Evidence 801(b)* does not apply to the statement because it is the statement of a panel and not a "person." Canez's arguments are unpersuasive.

Canez offered the statement to prove that the union's constitution prohibited an officer from taking a loan without prior approval. The statement, therefore, was offered to prove the truth of the matter asserted. Moreover, the statement was a statement by people who constituted a panel and thus *Federal Rule of Evidence 801(b)* applies. Because the statement was inadmissible hearsay, **[*7]** the district court did not err in excluding it.

VI. Causation

The district court held that Canez's refusal to sign an IOU was "an unforeseeable, independent supervening force that produced an unforeseeable result," thereby breaking the "causal connection between Hinkle's alleged negligent act [the bad advice about the loan] and the ultimate injury."

HN7 Under Arizona law, proximate cause exists "even if defendant's conduct contributes 'only a little' to plaintiff's damages, . . . if the damages would not have occurred but

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[2] Canez asserts that Arizona law does not require that his belief be objectively reasonable. In *Alexander v. Superior Court*, 141 Ariz. 157, 685 P.2d 1309 (Ariz. 1984), however, the Arizona Supreme Court, in holding that there was an attorney-client relationship, held that "it would have been *reasonable* for [the clients] to believe [the lawyer] was their attorney." 685 P.2d at 1314 (emphasis added).

for that conduct." *Robertson v. Sixpence Inns of Am., Inc., 163 Ariz. 539, 789 P.2d 1040, 1047 (Ariz. 1990)*. ***HN8*** A "superseding cause" may relieve the defendant of liability "only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary." *Id.*

Canez asserts it was Hinkle's malpractice in giving bad advice about the loan that caused Canez not to seek Executive Board and membership approval before obtaining the loan. The union stated, however, it did not fire Canez because he failed to get Board and membership approval; rather, it stated, it fired him because he refused to sign an IOU.

[*8] The question is whether we can say as a matter of law that the failure to sign an IOU was an unforeseeable, extraordinary, intervening force that broke the chain of causation between Hinkle's alleged malpractice and Canez's termination. We conclude there is a genuine issue of material fact as to this issue. Hinkle told Canez that it would be legal to take the loan. He did not tell Canez what he should do to document the loan. A reasonable jury could conclude that Hinkle reasonably thought it was unnecessary to sign an IOU for a loan that he had cleared with Hinkle. Although the union stated that it was Canez's refusal to sign an IOU, rather than his failure to get Board and membership approval, that caused his firing, it is not clear that if Canez had obtained Board and membership approval for the loan, his refusal to sign an IOU would have warranted his termination, especially in the absence of any evidence that a signed IOU was a necessary document in this kind of a loan transaction. In these circumstances, the proximate cause issue presents a question of fact to be resolved by the factfinder.

CONCLUSION

Summary judgment was improper because (1) Hinkle is not immune from **[*9]** suit pursuant to national labor relations laws, and (2) there are genuine issues of material fact.

REVERSED and REMANDED.