COURT OF APPEALS
DECISION
DATED AND RELEASED

November 19, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0004

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LICHTSINN & HAENSEL, S.C.,

Plaintiff-Respondent,

v.

ROBERT EISOLD and ROSEMARIE EISOLD,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Robert and Rosemarie Eisold appeal from a judgment following a bench trial awarding the law firm of Lichtsinn and Haensel, S.C., legal fees for its representation of the Eisolds in the sale of their stock in Computerized Distribution Services. The Eisolds claim: (1) that the trial court erred in concluding that the law firm had an enforceable contract with them making them responsible for the law firm's legal fees in connection

with the stock sale; (2) that the trial court erred in concluding that they were unjustly enriched by legal services from which they benefitted but for which they did not pay; (3) that the trial court erred in concluding that expert testimony was required to prove their allegations of legal malpractice, and that they failed to prove their legal malpractice claim; and (4) that the trial court erred in concluding that they failed to prove that the law firm committed fraud in its billing practices. The law firm seeks frivolous-appeal costs. We affirm the trial court, but decline to award frivolous-appeal costs.

The law firm sued the Eisolds for $5,105.25 for legal services for representing the Eisolds in the sale of their stock in CDS. The Eisolds denied liability, claiming that the purchaser of the CDS stock was responsible for the law firm's legal bills. The Eisolds also alleged, among other things, that the law firm was negligent in providing legal services because the closing documents drafted by the law firm did not include a provision as to who was responsible for paying the firm's legal fees in connection with the stock sale. Further, the Eisolds alleged that the law firm committed fraud in their billing the Eisolds for an unrelated case, ***Linotype v. Eisold et al.***, No. 92-C-0484 (E.D. Wis. filed Aug. 3, 1992).

The trial court found in favor of the law firm, determining that the Eisolds were responsible for unpaid legal fees for the law firm's representation of the Eisolds in the sale of their CDS stock. Further, the trial court dismissed the Eisolds' legal malpractice claim, concluding that they had not sustained their burden of proof because they failed to adduce expert testimony, and that they did not prove that the law firm was negligent. Finally, the trial court ruled that the Eisolds failed to prove that the law firm committed fraud in connection with its billing in the ***Linotype*** case.

First, the Eisolds argue that there was no contract between them and the law firm, and, therefore, the Eisolds were not responsible for the law firm's legal fees in connection with the CDS stock sale. Whether parties intended to create a valid contract is a question of fact. ***Novelly Oil Co. v. Mathy Constr. Co.***, 147 Wis.2d 613, 617, 433 N.W.2d 628, 630 (1988). We will uphold a trial court's findings of fact unless they are clearly erroneous. ***Id.***, 147 Wis.2d at 617-618, 433 N.W.2d at 630.

The trial court found that a valid oral contract existed between the Eisolds and the law firm. There is substantial evidence in the record to support the trial court's findings. An attorney from the law firm, Frank Bastian, testified that Mr. Eisold requested that he assist in the sale of the Eisolds' stock. Mr. Eisold confirmed this, and further testified that he never discussed with the buyer of the stock any arrangement for the buyer to pay the fees. He also testified that he did not instruct Bastian to negotiate with the buyer to have the buyer pay the law firm's fees.

The trial court found that the law firm performed the legal services as requested, that the Eisolds received a benefit from the legal services provided by the law firm, and that the Eisolds were responsible for paying the law firm's fees. These findings are not clearly erroneous. Evidence that a plaintiff performs valuable services at a defendant's request establishes a rebuttable presumption that the defendant promised to pay the plaintiff the reasonable value of those services. ***Theuerkauf v. Sutton***, 102 Wis.2d 176, 185, 306 N.W.2d 651, 658 (1981). The testimony elicited at trial satisfies this test by establishing that the Eisolds requested legal services, that valuable services were subsequently performed, and that the amounts billed represented the reasonable value of those services.

The Eisolds also argue that the trial court erred in its alternative finding that the Eisolds were unjustly enriched by the law firm's legal services. We need not address this issue because we have determined that the Eisolds were contractually liable for the fees. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need to be addressed).

The Eisolds also argue that the trial court erred in holding that the legal malpractice claim could only be established by expert testimony, and that they did not prove their legal malpractice claim. As noted, the Eisolds' legal malpractice claim arose out of the law firm's representation of the Eisolds in the sale of the CDS stock. The Eisolds argue that the law firm was negligent in drafting the closing documents for the sale of their stock because the closing documents failed to protect the Eisolds from "unknown liabilities" such as the law firm's legal fees.

In order to establish a claim for legal malpractice, a party must prove the following elements: (1) an attorney-client relationship giving rise to a duty; (2) a breach of that duty; and (3) damages proximately caused by the breach. ***Lewandowski v. Continental Casualty Co.***, 88 Wis.2d 271, 277, 276 N.W.2d 284, 287 (1979). Expert testimony is required to establish the second element of a malpractice claim, breach of duty, except where the breach, or lack thereof, is either so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen. *See* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 112, 362 N.W.2d 118, 128 (1985).

The Eisolds claim that the law firm's breach of duty should have been determined by the trial court as a matter of law. We disagree. This is not a case where want of care and skill is so obvious that the neglect is clear as a matter of law. The trial court did not err in concluding that expert testimony was necessary.

Further, the Eisolds claim that the trial court erred in finding that there was no evidence presented that the law firm was negligent in drafting the closing documents. In their argument, the Eisolds refer to the law firm's alleged breach of duty. As noted, the Eisolds failed to meet their burden of proof regarding a breach of duty by failing to present expert testimony on that issue.

Finally, the Eisolds argue that the trial court erred in finding that the law firm did not commit fraud in its billing practices. Specifically, the Eisolds claim that the evidence presented at trial was sufficient to prove a cause of action under § 100.18, STATS., as well as strict liability, intentional and negligent misrepresentation.

Section 100.18, STATS., is the "false advertising" statute, which "intends to protect the public from all untrue, deceptive or misleading representations made in sales promotions ... [including] the sales of real estate as well as consumer goods." ***Grube v. Daun***, 173 Wis.2d 30, 57, 496 N.W.2d 106, 116 (Ct. App. 1992); *see* § 100.18. This statute does not apply here because the counterclaim alleges deceptive practices in billing, not deceptive practices in advertising.

The Eisolds further argue that the evidence presented at trial was sufficient to prove strict liability, as well as intentional and negligent misrepresentation in the law firm's billing practices in connection with the firm's representation of the Eisolds in the ***Linotype*** case. The Eisolds argue that their personal interests in the ***Linotype*** litigation were actually represented by another law firm, Schultz & Duffey, S.C., and that the invoices Lichtsinn & Haensel characterized as pertaining to work done on the ***Linotype*** litigation were fraudulent because the invoices actually represented work the law firm did regarding the sale of the CDS stock.

Linotype sued National Colorite Corporation, Transgraphics Corporation, and their respective partners for money owing for machines purchased by NCC and Transgraphics from Linotype. Mr. Eisold, as a partner in Transgraphics, had previously assumed the Linotype debt and took $200,000 in tax deductions on his personal tax return for the depreciation of the equipment. Linotype alleged that all the partners in Transgraphics were jointly and severally liable. When the suit began, Mr. Eisold was the only partner who had substantial assets to pay this obligation. The Eisolds retained the Lichtsinn & Haensel law firm to represent them in the ***Linotype*** litigation. Bastian testified that he met with Mr. Eisold and discussed his potential liability for the Linotype debt. Another attorney from the Lichtsinn & Haensel law firm, Mike Bennett, testified that Mr. Eisold gave the law firm authority to move ahead with a defense and counterclaim.

The law firm billed for the ***Linotype*** litigation before Mr. Eisold's request that Bastian represent him in the sale of his stock in CDS. The trial court found the Eisolds could not have possibly believed that the Linotype bill was for services related to the sale of stock in CDS because all the law firm's work occurred prior to the sale of the CDS stock. The evidence supports the trial court's conclusion that the Linotype billing was not fraudulent.

The law firm requests actual costs and attorneys fees, claiming that this appeal is frivolous. *See* RULE 809.25(3), STATS. Although the appeal lacks merit, we cannot conclude that it is "frivolous" within the meaning of the rule.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.