Karapetian v. Garibian & Associates

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The issue before us is whether comparative negligence may be assessed against a client in a professional negligence action against a certified public accountant. We conclude that it can, and because the comparative negligence finding here is supported by substantial evidence, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between 1983 and 1989 appellant Vahe Karapetian acquired three life insurance policies with a combined death benefit exceeding $5 million and a net cash value at the time of surrender of $373,000. The annual premium for the three policies was approximately $62,000. By early 1999 the three policies were, or were close to becoming, self-sustaining.

In February 1996 Mr. Karapetian retained respondent Eva Garibian, a certified public accountant, to provide accounting services, tax and management consulting services, including federal and state tax, and estate planning. Ms. Garibian soon became Mr. Karapetian's highly trusted advisor and became actively involved in his personal insurance matters.

Ms. Garibian advised Mr. Karapetian that he needed to increase the amount of his life insurance to match the increase in the value of his estate. She explained that the $5 million death benefit from his three existing life insurance policies would be insufficient to cover his estate taxes. In 1998 Ms. Garibian proposed that Mr. Karapetian speak with an insurance broker she knew about a policy that had an $8 million death benefit. The broker was Razmik Khachatourian, a client of Ms. Garibian whom she had known for about a month. In discussing Mr. Karapetian's insurance needs, Mr. Khachatourian recommended to Ms. Garibian that the three policies be sold and their cash value used to purchase a Southland Insurance policy.

On January 6, 1999 Mr. Karapetian signed page three of a five-page Southland policy illustration. Mr. Karapetian did not read the page he signed, and later asked Ms. Garibian to explain it to him. Ms. Garibian relayed Mr. Khachatourian's explanation that the illustration page showed an $8 million life insurance policy with an annual premium of $60,000, payable until Mr. Karapetian reached age 78, at

which point the policy would become self-sustaining for the rest of his life. But Ms. Garibian had never seen the complete illustration, and was not aware that it explained that the policy required an annual premium of $287,607.40 to guarantee that it would remain in force until age 100, or that it projected insufficient fund value in year 21 (when Mr. Karapetian would reach age 79), or that it showed insufficient guaranteed fund value as early as year three of the policy. Although page three of the illustration showed the policy lapsing in year 21, based on her conversation with Mr. Khachatourian, Ms. Garibian believed that when a more complete illustration was issued, it would show the policy to be in effect for Mr. Karapetian's lifetime.[1]

Ms. Garibian advised Mr. Karapetian to proceed with the insurance "swap." She handled all the details of the transaction for Mr. Karapetian, "review[ing] everything to make sure all aspects [were] correct . . . ." Ms. Garibian then surrendered Mr. Karapetian's three existing insurance policies and had their cash value transferred to Southland. The Southland policy was issued in February 1999, with an annual premium of approximately $70,000.

In December 2001, Mr. Karapetian learned that in order to keep the policy in force he would have to increase his premium payments to $157,000 or more per year. He did not do so, and as a consequence, the policy lapsed after being in force for less than three years.

Mr. Karapetian and the Vahe Karapetian 1996 Insurance Trust sued Ms. Garibian and her accounting firm for professional negligence. Ms. Garibian alleged contributory negligence on the part of Mr. Karapetian as an affirmative defense. The case proceeded to a jury trial. Ms. Garibian requested BAJI 3.50, Contributory Negligence-Definition, and the instruction was given without objection.[2] The parties also submitted a special verdict form which included three questions pertaining to appellants' negligence in the transaction, and asked the jury to assess the proportion of damages attributable to appellants' negligence.

The jury found appellants had suffered damages totaling $2,173,000, but that 30 percent of those damages resulted from Ms. Garibian's negligence and 70 percent from appellants' own negligence in the transaction.

The trial court overruled appellants' subsequent objections to the special verdict, and denied appellants' motion for new trial and judgment notwithstanding the verdict. This appeal followed.

DISCUSSION

1. No Waiver

Without citation to authority, respondents contend that appellants waived any issue regarding the jury's negligence finding against appellants by preparing, submitting and failing to object to the special verdict form before it was submitted to the jury. But the general waiver doctrine does not

apply where, as here, a legal error can be corrected to prevent an undeserved and illegal windfall without doing violence to the jury's findings. After the special verdict was returned but before it had been converted into a judgment, appellants filed written objections to the inclusion of the comparative negligence finding in respondents' proposed judgment. Appellants also objected in posttrial motions. These objections preserved the issue for appeal. (All-West Design, Inc. v. Boozer (1986) 183 Cal.App.3d 1212, 1220.)

2. The Issue of Comparative Negligence Was Properly Before the Jury

California has adopted the doctrine of comparative negligence, under which responsibility and liability for damage is assigned "in direct proportion to the amount of negligence of each of the parties." (Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 829.)[3] Thus, where a plaintiff's conduct combines with the defendant's conduct to produce an injury, the plaintiff may be held accountable for a proportionate share of the resulting damages. (Knight v. Jewett (1992) 3 Cal.4th 296, 314.) California law recognizes comparative negligence in professional malpractice actions. (Theobald v. Byers (1961) 193 Cal.App.2d 147 (Theobald); McAdory v. Rogers (1989) 215 Cal.App.3d 1273, 1277.) In assessing comparative negligence, the issue of whether the client's conduct contributed to the injury is a question of fact for the jury. (Ewing v. Cloverleaf Bowl (1978) 20 Cal.3d 389, 399; Ishmael v. Millington (1966) 241 Cal.App.2d 520, 530.)

Appellants contend that the jury's negligence finding against appellants must be vacated because a client's reliance on the advice of a professional defendant cannot constitute comparative negligence as a matter of law. In support of this proposition, appellants rely on three California cases: Theobald v. Byers, supra, 193 Cal.App.2d 147, Day v. Rosenthal (1985) 170 Cal.App.3d 1125 (Day), and Daley v. County of Butte (1964) 227 Cal.App.2d 380 (Daley). We find these cases to be inapposite, as none limits apportionment of fault under the doctrine of comparative negligence in the manner appellants suggest. Indeed, of the three cases, only Theobald addresses the application of comparative or contributory negligence principles at all.

In Theobald, plaintiffs employed attorneys specifically to prepare a note and chattel mortgage in connection with a loan plaintiffs were making to third parties. The attorneys prepared the documents and delivered them to the borrowers without having the mortgage acknowledged or recorded. The borrowers declared bankruptcy, and plaintiffs, because of the invalid mortgage, were relegated to the position of unsecured creditors. (Theobald, supra, 193 Cal.App.2d at pp. 148-149.) Although the trial court found the attorneys' negligence proximately caused the plaintiffs' losses, it found plaintiffs' recovery to be barred by their own negligence in failing to record the chattel mortgage themselves or seek advice regarding acknowledgment or recordation from another attorney.

The plaintiffs in Theobald contended on appeal that the defense of contributory negligence was unavailable against a client seeking damages for the negligence of the attorney because the relationship is a fiduciary one and of a confidential nature. (Theobald, supra, 193 Cal.App.2d at p.

150.) The court rejected this contention, and held the defense of contributory negligence to be equally available to attorneys as to members of other professions. (Ibid.) Nonetheless, the court found that because plaintiffs' sole purpose in hiring defendants was to gain the lawyers' superior knowledge in conducting a specific legal transaction, plaintiffs could not be considered contributorily negligent in failing to perform the very acts for which they had retained the defendants. (Id. at p. 151.)

Unlike Theobald, Ms. Garibian was not hired for the specific task of conducting Mr. Karapetian's personal insurance affairs or for any expertise in insurance matters. Substantial evidence supports the finding that appellants retained Ms. Garibian as an accountant and general business and tax advisor for Mr. Karapetian's multiple business interests. As such, the extent to which appellants were entitled to rely on the superior knowledge of the expert depended upon all the circumstances presented, including the relative knowledge of the parties. While "[i]t is true that one employing an expert may reasonably rely upon the supposed superior knowledge of the expert . . . . such reliance must have some limitation." (Pekus v. Lake Arrowhead Boat Co. (1967) 255 Cal.App.2d 864, 869, 870.) We are satisfied that under Theobald, Ms. Garibian was entitled to assert a comparative negligence defense, and the issue of appellants' comparative fault and the extent to which it contributed to appellants' injury was properly presented to the jury.

Like Theobald, the Day and Daley cases also involved attorney negligence, but neither of these cases presented an issue of the client's comparative or contributory negligence. In Day, the attorney was retained to handle all the clients' business and financial affairs. The clients, who were highly successful in the entertainment field but uneducated and unsophisticated with respect to financial matters, relied entirely on the attorney for financial and investment advice. (Day, supra, 170 Cal.App.3d at p. 1135.) Over a period of years the attorney repaid that trust by gross mismanagement of their financial interests resulting in great financial loss. (Ibid.) Eventually the clients sued, and the trial court held the attorney liable to the clients for legal malpractice, breach of fiduciary duty, fraud, and abuse of process, and awarded the clients over $26 million including $1 million in punitive damages. (Id. at p. 1133.)

Among numerous issues, the Court of Appeal considered whether the trial court's findings were supported by substantial evidence, and whether certain of the negligence causes of action were barred by the applicable statute of limitations. (Day, supra, 170 Cal.App.3d at pp. 1149-1152, 1163-1167.) There was no issue of comparative negligence, and the court's discussion of the clients' failure to read the contracts and documents they signed and their failure to hire independent counsel to monitor the attorney's actions, cited by appellants here, pertained to the issue of the accrual of the causes of action for purposes of the statute of limitation. Accordingly, the Day case has no bearing on appellants' contention that a client's reliance on a professional's advice bars application of comparative negligence.

In the Daley case, the court reversed the trial court's denial of a motion to vacate a judgment of

dismissal for failure to prosecute. In recognizing the client's excuse from responsibility for the misconduct of her attorney, the court noted, "[c]lients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. . . . Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel. [¶] . . . it is unrealistic to expect a lay person to know of statutory deadlines and two-year dismissal statutes." (Daley, supra, 227 Cal.App.2d at p. 392.) The case presented no issue of contributory negligence, and the court's discussion of the client's failure to act to avoid dismissal of the case has no relevance to the instant action.

Appellants cite to numerous authorities from other jurisdictions to support their contention that the doctrine of comparative negligence has very limited application in cases of professional negligence where the client has relied on the professional's advice to his detriment. But none of these cases supports appellants' contention that in a professional negligence action comparative negligence cannot be assessed to apportion fault.

All of the cases relied upon by appellants recognize application of comparative or contributory negligence principles in a professional negligence setting. (Shapiro v. Glekel (1974) 380 F.Supp. 1053, 1058 [accountant malpractice]; National Surety Corporation v. Lybrand (1939) 256 A.D. 226 [9 N.Y.S.2d 554, 563] [accountant malpractice]; Conklin v. Hannoch Weisman (1996) 145 N.J. 395 [678 A.2d 1060, 1068-1069] [attorney malpractice, citing Theobald]; Fullmer v. Wohlfeiler & Beck (10th Cir. 1990) 905 F.2d 1394, 1398-1399 [accountant malpractice]; Greenstein, et al. v. Burgess Marketing (Tex.App.-Waco 1987) 744 S.W.2d 170, 190 [accountant malpractice]; Kushner v. McLarty (1983) 165 Ga.App. 400 [300 S.E.2d 531, 534] [attorney malpractice]; McWhorter, Ltd. v. Irvin (1980) 154 Ga.App. 89 [267 S.E.2d 630, 632] [attorney malpractice].)

These cases follow the general rule articulated by the New Jersey Court of Appeal "that when the duty of the professional encompasses the protection of the client or patient from self-inflicted harm, the infliction of that harm is not to be regarded as contributory negligence on the part of the client. [Citation.] . . . . The reason is that the patient's conduct relates to causation rather than duty." (Conklin v. Hannoch Weisman, supra, 678 A.2d at p. 1068.) In the cases involving accountant malpractice, the analysis also focuses on causation: "the correct rule of contributory negligence applicable in accountant's liability cases . . . is that expressed in [National Surety Corporation v. Lybrand, supra, 9 N.Y.S.2d at p. 563], namely, that the `[n]egligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth. . . .'" (Shapiro v. Glekel, supra, 380 F.Supp. at p. 1058.) "This rule . . . recognizes the duty of the accountant to comply with generally accepted auditing standards and, at the same time, recognizes the client's duty to not negligently interfere with the audit." (Greenstein, et al. v. Burgess Marketing, supra, 744 S.W.2d at p. 190.)

All of the accountant malpractice cases cited by appellants concern comparative fault principles

where the accountant has negligently performed an audit. None involves the situation presented here, of an accountant retained to provide general business advice who provides negligent advice outside the area of expertise. Under these circumstances we hold that the jury properly determined whether the client's conduct constituted comparative negligence, and what the apportionment of damages should be. (Ishmael v. Millington, supra, 241 Cal.App.2d at p. 530; see also Pekus v. Lake Arrowhead Boat Co., supra, 255 Cal.App.2d at pp. 869-870.)

3. Substantial Evidence Supports the Finding of Comparative Negligence

Appellants contend the evidence was insufficient as a matter of law to support a finding of comparative negligence. In reviewing a challenge to a judgment for insufficient evidence we are without power to substitute our own deductions for those of the trial court. (Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.) "`In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing." [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.'" (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60.)

In challenging the sufficiency of the evidence, appellants again rely on the Theobald case. There, the trial court found plaintiffs contributorily negligent for failing to seek advice from defendants or any other attorney about acknowledgement and recordation of the chattel mortgage, and for failing to record the chattel mortgage themselves. (Theobald, supra, 193 Cal.App.2d at p. 151.) Noting that plaintiffs employed defendants to perform a specific service and that defendants were negligent in performing that service, the court held the trial court had erred in finding the clients guilty of comparative negligence because the evidence was insufficient as a matter of law that the clients' actions or omissions constituted negligence. (Ibid.) In this regard, Theobald is distinguishable from the instant case.

Here, the evidence established that appellants hired Ms. Garibian not as an insurance agent, specifically charged with the task of conducting Mr. Karapetian's personal affairs regarding insurance, but as an accountant and general business and tax advisor for Mr. Karapetian's multiple business interests. Although it is unclear what contacts Mr. Karapetian had with Mr. Khachatourian, there was ample evidence that Mr. Karapetian knew that Mr. Khachatourian was the broker responsible for the Southland insurance transaction. Moreover, Mr. Karapetian's son, Nick Karapetian, who was the trustee of the Vahe Karapetian 1996 Insurance Trust, had both a business and personal relationship with Mr. Khachatourian. Finally, unlike the clients in the Day case, there was substantial evidence Mr. Karapetian was a sophisticated businessman whose failure to read any of the insurance documents prior to signing them and blind reliance on Ms. Garibian's advice on matters clearly outside of her professional expertise was simply unreasonable.

Relying on Gyerman v. United States Lines Co. (1972) 7 Cal.3d 488, appellants further contend that there was insufficient evidence to establish that any negligence on appellants' part was a proximate cause of their damages. In Gyerman, the court held that although the plaintiff longshoreman was responsible for reporting unsafe working conditions, and there was sufficient support in the record for finding that plaintiff failed to use ordinary care for his own protection, there was no evidence establishing that if plaintiff had reported the dangerous condition to his supervisor, the condition would have been made safer. The defendant thus did not meet its burden of proving that plaintiff's comparative negligence was a proximate cause of his injuries. (Id. at pp. 503-505.)

Here, appellants assert that even if Mr. Karapetian's failure to read documents, examine the transaction or scrutinize Ms. Garibian's conduct constituted negligence, respondent did not establish that such negligence was a substantial factor in causing appellants' injury. According to appellants, as in Gyerman, there was no evidence that if Mr. Karapetian had read the documents he would have understood them or taken any action other than to turn the documents over to Ms. Garibian for her consideration, explanation and advice, and he still would have suffered the same injury. We disagree.

The illustration page Mr. Karapetian signed without reading showed on its face that the policy would lapse when Mr. Karapetian reached age 79. The jury could therefore properly conclude that in entering into a complex insurance transaction, the duty of ordinary care called for Mr. Karapetian to at least read the documents he signed, and required him to consult the insurance broker he knew was handling the transaction rather than simply relying on a certified public accountant hired to handle tax and accounting matters for his businesses.[4] In Gyerman the existence of the dangerous condition was outside of plaintiff's control, and reporting it would not have removed it. In this case, the decision to go forward with this personal insurance transaction ultimately was made by Mr. Karapetian. While it was undisputed that he relied on Ms. Garibian's advice, the jury could reasonably have concluded that had he read the relevant documents and consulted with the insurance broker he knew was handling the transaction, his losses could have been avoided.

DISPOSITION

The judgment is affirmed. Appellants are ordered to bear respondents' costs of appeal.

We concur: BOREN, P. J., ASHMANN-GERST, J.

1. A new illustration was issued, based on the actual surrender values of the three policies and Mr. Karapetian's medical rating, but it too showed insufficient guaranteed value in year three and a monthly premium of $16,338.33 ($196,056 annually) to guarantee the policy to age 100. Neither Ms. Garibian nor Mr. Karapetian ever saw this illustration.

2. The record on appeal does not include the written jury instructions, any bench discussion pertaining to them, or a transcript of the instructions orally given to the jury.

3. Under former law, a plaintiff's contributory negligence operated as a complete bar to recovery. Following the adoption of the doctrine of comparative negligence, contributory negligence is no longer a complete defense in a negligence action. (Li v. Yellow Cab Co., supra, 13 Cal.3d at pp. 827- 829.)

4. We also reject appellants' contention, made without citation to any authority, that a defendant in a professional negligence action may not raise the client's general negligence as a defense unless that negligence proximately caused the defendant's professional negligence.