Circuit Court for Queen Anne's County
Case No.: 17-C-16-020783

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2180

September Term, 2017

WAYNE B. KNIGHT, et al.
v.

YUMKAS, VIDMAR, SWEENEY AND MULRENIN, LLC

Fader, C. J.,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: August 20, 2019

This case involves a counter-claim, filed in the Circuit Court for Queen Anne's County, alleging legal malpractice against the appellee, Yumkas, Vidmar, Sweeney and Mulrenin, LLC. The sole issue presented is whether the trial judge committed reversible error when he instructed the jury.

Wayne B. Knight ("Knight"), at all times here relevant, was the managing agent for 2021 Love Point, LLC ("Love Point"), Milford Properties, LLC ("Milford Properties"), and Milford Marina Enterprises, LLC ("Milford Marina"). On November 5, 2012, Charles R. Goldstein, the trustee in bankruptcy for K Capital Corporation ("K Capital"), sued Knight and Love Point in the United States Bankruptcy Court for the District of Maryland. The trustee asked for damages in the amount of $650,000 ("the Goldstein litigation"). Goldstein alleged that within one-year of the date that K Capital filed for bankruptcy, Knight and Love Point owed K Bank $1.3 million dollars on a loan, but Knight and Love Point thereafter negotiated a settlement with K Capital to buy-back the loan for $.50 cents on the dollar, i.e., $650,000. Goldstein contended that the buy-back agreement constituted a fraudulent conveyance because the defendants did not pay K Capital fair consideration for the loan buy-back.

I.

Procedural Background

In January of 2013, Knight and Love Point retained the law firm of Yumkas, Vidmar, Sweeney and Mulrenin, LLC ("the Law Firm") to represent them in the Goldstein litigation. At the time the Law Firm was retained, all parties were aware that Knight owed

M&T Bank ("M&T") about nine million dollars on notes that were not yet due, but were to become due very shortly. Love Point was jointly responsible with Knight for a portion of the debt, and Milford Properties was also jointly indebted with Knight for a separate portion.

While the Goldstein litigation was pending, the Law Firm, on behalf of Knight and Love Point, filed suit in the Circuit Court for Baltimore County against M&T. That case was removed by M&T to the United States District Court for the District of Maryland where the Law Firm, on behalf of Knight and Love Point, filed an amended complaint. M&T filed a motion to dismiss the amended complaint for failure to state a cause of action. That motion was granted by the federal court. The Law Firm, on behalf of Knight and Love Point, then filed an appeal of the dismissal to the United States Court of Appeals for the Fourth Circuit.

Meanwhile, M&T filed a confessed judgment action against Knight and Love Point in the Circuit Court for Queen Anne's County. The Law Firm, on behalf of Knight and Love Point, filed a motion to vacate the confessed judgment, which was granted.

M&T also filed a foreclosure action against Love Point in the Circuit Court for Queen Anne's County. The Law Firm represented Love Point in that foreclosure action. Additionally, M&T filed an action for breach of contract and a foreclosure action in Delaware against, *inter alia*, Knight and Milford Properties. The breach of contract and foreclosure cases were consolidated and the Law Firm coordinated the defense of those actions with Delaware counsel. Lastly, M&T filed a foreclosure action against Knight, and

others in the State of Florida. The Law Firm coordinated the defense of that action with Florida counsel.

None of the property owned by either Knight, Love Point or Milford Properties ever went to foreclosure sale because, by September 30, 2015, all the suits filed by M&T, and the appeal filed in the Fourth Circuit by Knight and Love Point were resolved by a settlement between the appellants and M&T. As of September 30, 2015, only the Goldstein litigation was still pending.

For legal services rendered by the Law Firm in the aforementioned lawsuits, Knight, Love Point and Milford Properties were billed for a total of more than $299,000 of which the clients, as of September 30, 2015, had paid over $211,000, leaving a balance due of $88,346.13.

In September 2016, the Law Firm filed, in the Circuit Court for Queen Anne's County, an amended complaint against Knight, Love Point and Milford Properties in which the Law Firm sought to recover legal fees of $88,346.13,[1] plus interest.

In March 2017, Knight, Milford Properties, and Love Point filed a first amended counterclaim against the Law Firm. The counterclaim contained two counts. Count I

[1] In their amended complaint, the Law Firm also sued Milford Marina under a successor liability theory. The Law Firm alleged that on March 29, 2016, Milford Properties transferred its only asset to Milford Marina. According to the amended complaint, the transfer was "without sufficient consideration." At trial, after the Law Firm rested its case, the trial judge granted Milford Marina's motion for judgment. The correctness, *vel non*, of that grant of judgment is not an issue in this appeal.

alleged that the Law Firm was guilty of legal malpractice. Counter-plaintiffs contended that the Law Firm was negligent in the following respects:

- advising the counter-plaintiffs, whose liabilities far exceeded their assets, to **not** file for bankruptcy protection, but instead advising them to spend hundreds of thousands of dollars on unnecessary and unproductive litigation in multiple jurisdictions;
- failing to advise Knight **not** to quickly sell real estate he owned in Florida at below market value when the automatic stay offered by a bankruptcy filing would have provided Knight with adequate time to sell the property at fair market value; and
- failing to advise Knight **not** to sell his "homestead" in Florida at below market value when the "homestead" would have been protected from a foreclosure sale if Knight had filed for bankruptcy.

Count II of the counterclaim alleged that the Law Firm had breached the applicable standard of care when it represented Knight and Love Point in the Goldstein litigation by "failing to timely and diligently respond to discovery requests . . . let alone advise its clients to do so[.]" Count II further alleged that as a result of that breach of duty, the judge in the Goldstein litigation imposed sanctions against Knight and Love Point "in an amount in excess of $14,000." In Count II, Knight and Love Point asked for a judgment against the Law Firm in the amount of $20,000 "plus interest, costs and any and all other relief to which this Honorable Court finds them entitled."

The Law Firm's action to recover fees and the counterclaim for malpractice were tried before a jury in the Circuit Court for Queen Anne's County over a four-day period in

December 2017. The jury found in favor of the Law Firm and awarded it a total of $98,631.19 in damages.[2] The damages for which each party was liable were:

A. Wayne Knight:	$40,537.45
B. Love Point	$38,273.21
C. Milford Properties	$19,820.53

The jury also found that the Law Firm did not commit legal malpractice.

After the judgments were entered, the defendants/counter-plaintiffs paid off the judgments that had been entered against them for the fees they owed the Law Firm. Nevertheless, Knight, Love Point and Milford Properties, filed an appeal to this Court in which they challenge the entry of the judgment against them in the legal malpractice case. They phrase the issue presented in this appeal as follows:

> Did the trial court commit reversible error when it instructed the jury that an attorney's trial strategy and tactics are not the basis for a legal malpractice action?

For the reasons set forth below, we shall affirm the judgment entered against the appellants in the Circuit Court for Queen Anne's County.

II.

The Trial

Knight testified that Mr. Vidmar, a member of the Law Firm, advised him not to seek bankruptcy protection. Instead, he was advised that if he engaged M&T in litigation, he could probably settle for fifty cents on the dollar ($4.5 million dollars.). Ultimately the

[2] The award included interest.

cases did settle with M&T, but he had to pay M&T more than $4.5 million dollars. Knight did not divulge the amount of settlement because he had entered into a confidentiality agreement with M&T.

In regard to damages, Knight testified that in 2015 he owned two homes on Caxambas Drive in Marco Island, Florida. These were both rental properties. In 2015, based on Mr. Vidmar's advice, Knight sold 1550 Caxambas Drive for 1.65 million dollars. In 2016, again based on Mr. Vidmar's advice, he sold the home at 1491 Caxambas Drive for 3.7 million dollars. Both properties were sold to raise money so that Knight could settle with M&T. Knight testified that, in his opinion, the two Florida properties would have sold for a total of one million dollars more if he had declared bankruptcy, because a Chapter 11 bankruptcy filing would have given him more time to sell the two properties. Counsel for the Law Firm brought out on cross-examination: 1) that Knight had initially said in interrogatory answers that if he had had more time he would have realized a total of $100,000 more and not an additional $1,000,000; 2) that the Florida properties had been listed for sale for several years, but Knight had never received his asking price; and 3) in a 2012 financial statement, Knight had listed the 1550 Caxambas Drive property for $450,000 less than it sold for; and in a financial statement given to M&T in 2015, he listed 1491 Caxambas Drive as being worth $1,000,000 less than its 2016 sale price.

Mr. Vidmar testified that when his firm was retained by appellants, he discussed with Knight, on numerous occasions, "the pros and cons" of filing for Chapter 11

bankruptcy protection.[3] Mr. Vidmar left it up to Knight to decide, but he testified that he strongly advised against filing for such protection and Knight accepted that advice. The reason for that advice was that, in Mr. Vidmar's opinion, Knight, Love Point and Milford Properties were likely to retain significantly more of their assets if they settled the cases with M&T than they would if they filed for Chapter 11 bankruptcy protection. A second reason for advising against bankruptcy was because a debtor who files a petition for Chapter 11 bankruptcy protection must thereafter file, every thirty days, a great deal of paperwork to keep the court advised of the debtor's current financial status. Mr. Vidmar did not think that Knight was likely to be able to make the necessary filings in a timely manner. And, if Knight failed to make these filings on time, the bankruptcy court might appoint an independent trustee, which would mean that Knight would lose control of all his assets.

James Schraf, Esquire was one of the lawyers from the Law Firm that represented Knight and Love Point in the Goldstein litigation. Mr. Schraf was examined in great detail by counsel for the appellants as to why, in the Goldstein litigation, sanctions of over $14,000 were imposed against Knight and Love Point. Mr. Schraf explained that on July 10, 2014, the bankruptcy judge in the Goldstein case ordered Knight and Love Point to produce documents and amend certain interrogatory answers within 15 days. That order was not obeyed. Subsequent to the order, counsel for the trustee in bankruptcy took

[3] According to Mr. Vidmar, and all the other experts who testified, if appellants filed for bankruptcy, Chapter 7 or Chapter 13 bankruptcy would not have been viable options.

Knight's deposition. In that deposition, Knight admitted that he had not even made a search for some of the documents that the court had ordered he produce. Accordingly, Goldstein's counsel, in March 2015, filed a motion asking that the court either enter a default judgment against Knight and Love Point or impose sanctions equal to the amount of attorney's fees expended in forcing compliance with the court's order. Ultimately, the bankruptcy judge elected to impose sanctions against Knight and Love Point, but not to enter a default.

At trial, one of the major issues in dispute was whether the sanctions imposed for not complying with the July 10, 2014 order, was due to Mr. Schraf not having acted in a timely and reasonable manner or whether it was Knight's fault for failing to cooperate with his counsel to produce the documents. According to Schraf's testimony, he had asked Knight to produce the documents at issue for months prior to the date that the trustee asked for sanctions, but Knight would not cooperate. On the other hand, Knight testified, in effect, that it was Mr. Schraf's fault that the interrogatories were not supplemented and the documents were not produced in a timely fashion.

At trial, in order to prove their legal malpractice case, the appellants called, as their expert witness, Tate Russack, Esquire. During his testimony, Mr. Russack had three criticisms of the legal representation provided by the Law Firm. First, and most important, he opined that members of the Law Firm deviated from the appropriate standard of care by not advising Knight to immediately file for Chapter 11 bankruptcy. According to Mr. Russack, an attorney acting with the appropriate standard of care would have realized that appellants would likely retain more of their assets if they filed for Chapter 11 bankruptcy

protection than they would if they simply tried to litigate and then settle the matter with M&T.

On direct examination, Russack opined that appellants, if they had filed for Chapter 11 bankruptcy protection, would have retained assets worth one million dollars more than they retained as a result of the settlement with M&T. The trial judge asked the witness how he could arrive at such an opinion if (as here) he didn't know the amount M&T had accepted in settlement. After Russack admitted that this was a "real problem," the court instructed the jury to disregard Mr**.** Russack's estimate of damages.

On cross-examination, counsel for the Law Firm and Mr. Russack had the following exchange that illustrated how difficult it was to know whether appellants had been harmed by the Law Firm's advice to not seek Chapter 11 bankruptcy protection:

> Q. Now, you agree with me, don't you, Mr. Russack, that sitting here today, in December of 2017, it's your opinion that the result reached because of the services rendered by the law firm for Mr. Knight was preferable and more favorable to [sic] the result that would have occurred if they had gone into bankruptcy?
>
> A. It's a very difficult question to answer. Having given it quite some thought because I believe you asked me at my deposition the same question or something similar to this, the problem being that they never filed for bankruptcy. So all we can guess at is what would have come to pass in bankruptcy. So I don't really know if it was more favorable.
>
> Q. You don't know?
>
> A. What I do know is that Mr. Knight still has assets, post the litigation, and that one of the possibilities in a bankruptcy is a liquidation of assets.
>
> Q. And do you recall telling me that you could answer that question at deposition and that you agreed that the result achieved by the Yumkas law

firm was a better result for Knight by liquidating and settling with M&T - - litigating and settling with M&T than if he had put his companies in bankruptcy? Do you remember telling me that at your deposition?

A. I recall the question and I recall my answer.

Q. You haven't changed that opinion, have you?

A. Well, actually, I think that, ultimately, I have changed that opinion to add that in order to really know the answer . . . there would have had to be a bankruptcy filed with the same creditor and a similar debtor that we could compare it to and we can't and that's the difficulty here.

Q. Do you remember that later in your deposition you testified when you look at it today, I agree that the litigation route and settlement was a better route than bankruptcy when you consider assets Mr. Knight has today and what could have been his complete liquidation had bankruptcy been filed? Do you recall giving that testimony?

A. I absolutely recall giving it.

Q. You're not changing that testimony, are you?

A. No. When compared to a complete liquidation, he's better off today.

Q. You also testified at your deposition that a complete liquidation was certainly possible if he had gone into Chapter 11, didn't you?

A. It is one of the possibilities in a bankruptcy.

The second criticism voiced by Mr. Russack against the Law Firm, was that members of the Law Firm deviated from the appropriate standard of care by filing a complaint in the United States District Court for Maryland against M&T that had no merit and, due to that lack of merit, the case was dismissed by a federal judge on the grounds that the complaint did not state a cause of action upon which relief could be granted.

The third criticism was that, according to Mr. Russack, the Law Firm deviated from the appropriate standard of care by acting in a dilatory manner in response to the bankruptcy judge's July 10, 2014 order to supplement interrogatory answers and to produce documents.

The expert witness called by the Law Firm was Lawrence Katz, Esquire. Mr. Katz opined that the Law Firm did not deviate from the appropriate standard of care in their representation of appellants. More specifically, he testified that the Law Firm appropriately advised appellants not to file for bankruptcy protection. He gave a detailed explanation as to why he held that view. He also testified that the Law Firm did not deviate from the appropriate standard of care in regard to the sanctions issue or by filing a lawsuit against M&T that a federal judge later determined to have no merit.

At the conclusion of the evidentiary phase of the case, the trial judge instructed the jury both orally and in writing. One of those instructions was the one set forth in the Maryland Pattern Jury Instructions (MPJI Cv 27.7), which provides "[a] lawyer is negligent if the lawyer does not use that degree of care and skill that a reasonably competent lawyer acting in similar circumstances would use."

In addition, at the request of the Law Firm, the trial judge gave the following non-pattern jury instruction: "an attorney's trial strategy and tactics are not the basis for a malpractice action." That instruction was based on language taken from the case of *Fishow v. Simpson*, 55 Md. App. 312, 322 (1983) (hereinafter "the *Fishow* instruction").

Counsel for appellants objected to the *Fishow* instruction as follows:

> Your Honor, I object to giving the trial strategy tactics; that that's not a basis for a malpractice claim. I think it needs to be if it is an informed and reasoned decision – I think the way the instruction was given it treats it as an absolute defense and I don't think – or absolute immunity at most and I think it needs to be a reasoned and informed decision, not strategy. So I think that the way it was given it's almost like an absolute immunity. . . .

The trial judge overruled the objection.

During closing argument, the *Fishow* instruction was only mentioned once, and that was by appellants' counsel, who impliedly treated the *Fishow* instruction as if it was favorable to his clients, *viz.*:

> So Mr. Russack provided, I would basically boil down to three opinions in the case in terms of the breach of the standard of care. He identified other ones as well, but the primary one[was] the [b]ad bankruptcy advice. I asked Mr. Russack, now, in terms of strategic decisions, do they need to be informed and reasoned decisions and he said, yes, they need to be informed and reasoned decisions. Why that's important is because the court gave you an instruction about trial strategy.

(Emphasis added.)

III.

ANALYSIS

We review a trial judge's decision whether to give a jury instruction under an abuse of discretion standard. *CSX Transp., Inc. v. Pitts*, 430 Md. 431, 458 (2013) (citing *Conyers v. State*, 354 Md. 132, 177 (1999)). A trial judge's decision as to whether to give an instruction "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Stabb v. State*, 423 Md. 454, 465 (2011) (quotation marks and citations omitted).

A. Non-Preservation

When a party to an appeal claims that the trial court committed reversible error when it overruled an objection to an instruction, we will only consider the basis for the objection raised by the objecting party in the trial court. *See Black v. Leatherwood Motor Coach Corporation*, 92 Md. App. 27, 33-34 (1992). *See also, Johns Hopkins Hospital v. Correia*, 174 Md. App. 359, 383 (2007), *aff'd* 405 Md. 509 (2008) (holding that because trial counsel did not object at trial on the basis that jury instruction was confusing, "this issue is not preserved for review"). What the Court of Appeals said in *Fearnow v. Chesapeake & Potomac Telephone Co.*, 342 Md. 363, 378 (1996) is also relevant:

> If the party objecting does not clearly state, at the time of the objectionable instruction, the nature of the objection and the reasoning and law on which the objection is grounded, an appellate court can hardly find error, at that same party's request, in a trial judge's failure to correct a mistake in the charge.

Appellants' contention, as set forth in their brief, as to why the court abused its discretion when it told the jury that "an attorney's trial strategy and tactics are not the basis for a malpractice action" is that the instruction was "not supported by the [e]vidence or [e]ven the [c]laim of the [a]ppellants." In this regard, appellants assert that:

> "[t]he primary focus of the[ir] malpractice claim, encompassed the pre-trial and pre-suit legal advice to not file a bankruptcy action but rather to litigate all of the cases. The instruction to the jury insinuated that the jury should focus its analysis on the "strategy" and "tactics" during the litigation.[4] This was not the claim.

[4] The trial judge in his instruction never told the jury that it should "focus its analysis" on litigation strategy or tactics.

The argument just quoted, was not made in the trial court. Therefore, the argument is not preserved for appellate review.

Nowhere in appellants' brief, does their current counsel (not counsel below) make any effort to support the contention that was raised below, i.e., that the trial judge should have modified the *Fishow* instruction by telling the jury that trial strategies and tactics are not the basis for a malpractice action if the trial strategy or tactics are based on an "informed and reasoned decision."

B. Prejudice

Even if we were to hold that appellants had properly preserved for our review, the arguments they now raise, appellants would not benefit. We say this because in every civil case, an appellant must prove not only that the trial judge committed error, but that the error was prejudicial. *Flores v. Bell*, 398 Md. 27, 33 (2007). *See also, Miller v. Mathias*, 428 Md. 419, 446 (2012) ("It is just as well settled [that] . . . an error that is not shown to be prejudicial does not warrant reversal") and *Benik v. Hatcher*, 358 Md. 507, 537 (2000). Appellants' claim that they were prejudiced because the jury should have been allowed to make the decision as to whether Mr**.** Russack's opinion that he considered it a breach of the standard of care for agents of the Law Firm to elect "the litigation route versus filing a bankruptcy[.]" Impliedly, appellants maintain that the jury never got to make that decision, because, according to appellants, the *Fishow* instruction "essentially directed the jury to find against the [a]ppellant[s]. A more prejudicial instruction could hardly be imagined as the erroneous instruction was 'misleading' at worst or 'distracting for the jury' at best."

The appellants also argue that "[b]y deviating from the pattern jury instruction and instructing the jury that essentially they were not to consider 'strategy' and 'tactics' with respect to the [a]ppellant[s'] malpractice claim, the jury essentially had no choice other than to find against the [a]ppellant[s]."

None of these arguments is persuasive. As appellants argued earlier in their brief, the crux of their case had to do with the claim that the Law Firm gave bad advice when appellants were advised to not file for bankruptcy protection.[5]

Giving negligent advice has nothing to do with deficient trial tactics or strategy. And clearly the jury did get the opportunity to decide whether giving the advice met the applicable standard of care. Attorneys for both sides, in their closing arguments, explicitly argued at length that the jury should consider whether the advice given by the Law Firm met the applicable standard of care. Notably, counsel for the Law Firm, when she discussed the malpractice issue with the jury, never once mentioned the instructions about which appellants now complain. Instead, counsel for the Law Firm argued, based on Mr. Katz's testimony, that there was no deviation from the appropriate standard of care when members of the Law Firm advised appellants not to file for bankruptcy. Counsel for the Law Firm also stressed that appellants' own expert, Mr. Russack, admitted that he believed, as things turned out, that Knight may have retained more of his assets by settling the cases with M&T, than he might have retained if he had gone through bankruptcy. On the other hand,

[5] The two other criticisms of the Law Firm (filing a claim against M&T that a federal judge later dismissed and the Law Firm's handling of the sanctions issue in the Goldstein litigation) had nothing to do with trial tactics or strategy.

counsel for appellants argued, based on Mr. Russack's testimony, that members of the Law Firm deviated from the appropriate standard of care by not advising appellants in January of 2013, to immediately file for bankruptcy.

What counsel for both sides focused on in closing argument is understandable. The counter-complaint filed by appellants did not allege that the Law Firm used bad trial strategy or trial tactics. No witness criticized the trial tactics used by the Law Firm in representing appellants because there never was a trial. And, giving advice, which the client could either accept or reject, as to whether bankruptcy protection should be sought, would not ordinarily be thought of as engaging in discussions of trial strategy. As Mr. Russack acknowledged in his testimony:

> I don't believe the advice to not file bankruptcy or to file bankruptcy is strategy as much as it's the conclusion of the attorney as to what the client should do. So I think strategy is reserved for lesser issues than file bankruptcy or litigate.

Lastly, in the portion of their brief dealing with prejudice, appellants argue:

> to evaluate how prejudicial an erroneous instruction might have been, a reviewing court may consider, among other things[:] (1) how the appellee's argument to the jury "may have contributed to the instruction's misleading effect," (2) whether the jury asked for a rereading of the erroneous instruction and (3) the effect of other instructions in remedying the error. *Barksdale* [*v. Wilkowsky*], 419 Md. [649,] 669 [(2011)] (*quoting Nat'l Med. Transp. Network v. Deloitte & Touche*, 62 Cal. App. 4th 412, 72 Cal. Rptr. 2d 720, 731 (1998)) (internal quotation marks removed).

The test set forth in *Barksdale* does not help appellants. As previously stated, counsel for the Law Firm, during closing argument, never even mentioned the instruction that appellants claim to be "erroneous." Moreover, the jury never asked for a rereading of

that instruction. And, by giving the jury the pattern jury instruction set forth in MPJI Cv 27.7, the jury was appropriately instructed.

For all of the above reasons, we hold that even if the arguments set forth in their brief as to why the court erred in giving the *Fishow* instruction had been preserved, appellants have failed to demonstrate that they were prejudiced by the trial judge giving that instruction.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.