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Florida Supreme Court Bases Probate Attorney's Fees on Reasonable Rate, Not Fixed Percentage

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Collins argued that her losses were not economic because a distinction could be made between those losses due to Legner's breach of the installment contract and those due to Reynard's negligence. Collins stated that she sought only to recover the losses incurred because of Reynard's negligence, rather than for amounts due under her contract with Legner. The court, however, found no distinction. Regardless of the terminology used, Collins sought to recover economic losses in the amount due under the contract, including the principal, interest, cost of collection, and attorney fees.

Losses Do Not Fit an Exception

Having concluded that Collins sought only economic damages, the court then considered whether recovery of economic loss in tort cases, including legal malpractice, could be based on negligence. The leading case in this area, *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982), rejected a products liability complaint seeking solely economic loss under the tort theories of strict liability, negligence, or innocent misrepresentation. However, the decision set forth two exceptions, making economic losses recoverable when: (1) a person intentionally made false representations; or (2) when a person in the business of supplying information to guide others in their business transactions made a negligent representation.

The court here found Reynard's conduct did not fall within either exception, as neither intentional nor negligent misrepresentation was alleged. Further, the Restatement (Second) of Torts states that the second exception does not apply to lawyers, but to suppliers of information such as surveyors, newspapers, accountants, and credit bureaus.

Thus, the court found that recovery for economic loss under legal malpractice was limited to instances in which the attorney owed a duty not only to the client, but also to individuals that the client intended to benefit. The limited exception was inapplicable in this case because there was no

evidence that Reynard breached any extracontractual duty owed to Collins.

Contract, not Tort, Proper Cause of Action

The court noted that the denial of Collins's tort claim did not lead to an unjust result because Collins still had a pending contract claim. The court stated that contract law provided a better basis than tort law for the resolution of cases concerning the failed expectations of clients when the only losses sought to be recovered are economic. Contract law applies to the obligations that parties voluntarily undertake and their mutual expectations. Tort law, in contrast, imposes a standard of conduct designed to protect third parties from unreasonable risk. Failure to conform to the standard creates liability, even in the absence of a contract. Here, Collins freely entered into the contractual relationship with Reynard, and no further duties existed. Therefore, a contract action was the appropriate route for Collins to pursue.

The Dissenting Opinion

Chief Justice Miller's dissent argued that the majority improperly abandoned an established body of case law. Prior to this case, tort law had been recognized as a proper ground for recovery of malpractice actions, and courts had given no indication that tort-based recovery was improper.

The dissent also stated that it was inappropriate to place attorney malpractice actions within the *Moorman* doctrine. Throughout its development, the doctrine had denied tort remedies to a party whose complaint was rooted in disappointed contractual or commercial expectations. The theory behind denying recovery was that the party could have bargained for a guarantee or warranty against the type of harm suffered. Applying the theory behind the *Moorman* doctrine to the area of legal representation was difficult, however, because attorneys rarely will guarantee or promise a particular result to a client.

Rehearing was granted on February 3, 1992. No opinion has been

issued as of publication.

Stacy Feldman

Florida Supreme Court Bases Probate Attorney's Fees On Reasonable Rate, Not Fixed Percentage

In *In Re Estate of Platt*, 586 So.2d 328 (Fla. 1991), the Supreme Court of Florida held that in probate or condemnation procedures, attorney and personal representative fees could not be calculated as a percentage of the estate's value. Rather, reasonable fees should be assessed by applying the state statute governing attorney's fees, which allows consideration of an hourly rate.

Background

For the two years prior to his death, Lester Platt ("Platt") was incompetent. His attorney, George A. Patterson ("Patterson"), and NCNB National Bank ("NCNB") served as his co-personal representatives, and were compensated accordingly. Platt died leaving his two children, Patricia Platt Faulkner and Barbara Platt Swanson ("Daughters") as the beneficiaries of his seven million dollar estate.

At the beginning of probate, Patterson and NCNB advised the beneficiaries that their co-personal representative fees and attorney's fees would be 4.5 percent of the Platt estate, or approximately \$315,000. The Daughters objected to this method of payment and instead requested that Patterson and NCNB keep accurate time records of their services.

When probate closed two years later, Patterson and NCNB sought fees totalling \$489,877, about 6 percent of the value of Platt's estate. Patterson requested \$144,300 for attorney's fees and \$92,500 for his co-personal representative role. The bulk of Patterson's staff services consisted of typing and proofreading services. NCNB sought a fee for its work as corporate representative, plus an additional sum for extraordinary services. The Daughters asked the

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Attorney's Fees

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district court to determine the appropriate compensation.

Trial and Appellate Opinions

The trial court found that the percentage fees were reasonable. It granted Patterson's request for attorney's fees but reduced his co-representative earnings. The court also awarded NCNB's sum as corporate representative, but denied NCNB's compensation request for extraordinary services.

The Daughters appealed to the Fourth District Court of Appeals and argued that the trial court had incorrectly applied the statute governing probate fees. They contended that section 733.617, Florida Statutes (1987), detailed several factors to consider in order to set these type of fees, one of which was the amount of time and effort involved in representing the client. The Daughters further argued that nothing in the provisions of section 733.617 prevented the application of an hourly rate to help assess a reasonable fee. The appellate court, however, upheld the trial court's assignment of fees based on the value of the decedent's estate. The Daughters appealed to the Florida Supreme Court.

Reasonable Fee is Correct Standard

The Supreme Court of Florida examined the legislative history of section 733.617 to ascertain whether a sliding percentage scale was the appropriate method for calculating compensation. The section's predecessor statute expressly provided for a sliding percentage fee scale based on the size of the estate handled by the attorney. However, in 1974 this section was replaced, and attorneys and other professionals were to receive reasonable compensation for their services, rather than a percentage of the estate. The factors later added to assist a trial judge in determining reasonable fees included, among others, consideration of: (1) the time and labor involved in the case and the skills needed to provide the service; (2) the restrictions placed on other employment while

providing the service; (3) the fees customarily charged in the community for comparable service; (4) the nature and duration of the relationship between the professional and the decedent; and (5) the amount of time and effort involved and the results obtained. The Florida Legislature instructed that one or more of these factors should be used to determine reasonable compensation.

Consequently, the Florida Supreme Court found that legislative intent dictated that a reasonable fee, not a percentage rate, should be the standard used to determine compensation. The court recognized that since section 733.617 applied to various professionals employed to handle an estate, all provisions would not apply to all professional categories. However, all factors which applied to a specific category of professionals should be consistently applied within that profession so that a reasonable fee in one case would be consistent with others fees in similar cases. Thus, the court reasoned that the value of an estate should not be the controlling factor, but one of several elements for attorneys to consider when determining fees.

Goal is Consistent Results

The court explicitly rejected an argument proposed by the Real Property, Probate and Trust Law Section of the Florida Bar, which presented a supplemental brief in support of Patterson. The court disagreed that the "one or more of the following" language in the statute permitted a judge to find attorney's fees based on the value of the estate alone or in combination with any of the other factors listed under section 733.617. The Florida Supreme Court stated that allowing such random assessments among judges would leave the public without consistent results in probate cases.

Hourly Rate Part of Determination

Lastly, the court held that the hourly rate approach should be employed to help ascertain a reasonable attorney's fee because this method mirrored the approach to fee assessment taken in section

733.617. In this case, however, the trial court's records were unclear as to which of the services provided by Patterson's staff should be categorized as attorney's fees and which should be considered additional fees. Thus, the Florida Supreme Court remanded the case back to the trial court for conclusive determinations.

Clarinda Gipson

California Holds Ski Lift Operators to Higher Standard of Care in Tort Cases

In *Squaw Valley Ski Corporation v. Superior Court of Placer County*, 3 Cal. Rptr. 2d 897 (Cal. Ct. App. 1992), the California Court of Appeals for the Third District held that ski lift operators are common carriers and therefore are held to a higher standard of care for the purpose of determining liability in tort cases.

Background

Squaw Valley Ski Corporation ("Squaw Valley") operates skiing facilities in California. In order to use Squaw Valley ski lifts, patrons must have skis, bindings, boots, and valid lift passes. Patricia Bowles ("Bowles"), having complied with these requirements, approached one of Squaw Valley's chair lifts in April of 1986. As she attempted to board, a chair struck Bowles in the head causing injuries.

Bowles sued Squaw Valley in the Superior Court of Placer County, California, asserting that the company negligently operated the ski lift because no employees were present to help patrons board. Prior to trial, Bowles asked the court to establish that Squaw Valley was a common carrier for the purpose of determining tort liability.

The basic standard of care in negligence cases is ordinary care, the measures a reasonable, prudent person would use under the circumstances. A common carrier, on the other hand, is held to a higher standard of care because a California liability statute imposes a duty