IN THE COURT OF APPEALS OF IOWA

No. 0-458 / 09-1387
Filed October 6, 2010

DENISE M. WILLIAMS, an Individual,
Plaintiff-Appellee,
vs.
KATHRYN E. BARNHILL, an Individual,
BARNHILL & ASSOCIATES, P.C., an
Iowa Corporation, and DEBBIE J. ALFREY, an Individual,
Defendants-Appellants.

KATHRYN E. BARNHILL, an Individual,
and BARNHILL & ASSOCIATES, P.C.,
an Iowa Corporation,
Cross-Claimants,
vs.
DEBBIE J. ALFREY,
Defendant to Cross-Claim.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendants appeal the district court's denial of their motion for judgment notwithstanding the verdict and motion for new trial. **AFFIRMED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown for appellants Kathryn Barnhill and Barnhill & Associates, P.C. and Gerald B. Feuerhelm of Feuerhelm & Kenville, P.C., Des Moines, for appellant Debbie J. Alfrey.

Frederick B. Anderson of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, and Earl B. Kavanaugh and Harvey L. Harrison of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Denise Williams is a self-employed hairdresser. In roughly 2004, Williams began having financial problems and got behind in paying her bills, including sales and income tax. Williams received bookkeeping assistance from at least two different individuals but still was unable to manage her finances. In late 2004 or early 2005, she moved from Salon Classique and began renting her own chair at Salon Halo.

In September of 2005, Williams made an appointment with Kathryn Barnhill, an attorney at and sole owner of Barnhill & Associates, P.C.[1] Williams made the appointment on the recommendation of Debbie Alfrey, a hairdressing client of Williams, and Barnhill's long-time office manager. At this meeting, Williams told Barnhill that she had not paid her 2003 income taxes, had not filed her 2004 income tax return, was behind on a number of bills, and was in danger of having her sales tax license revoked by the Iowa Department of Revenue because she was delinquent on her sales tax payments. Williams asked for Barnhill's help and became a client of Barnhill and the law firm.

Barnhill asserts that she agreed to help Williams only with her sales tax problem. Williams testified that Barnhill also said she would assume complete control over Williams's financial affairs. Barnhill testified that Alfrey and Williams made an arrangement in which Williams would bring all of her income and bills to Alfrey, who would deposit the income in the trust account of Barnhill and

[1] All arguments made by Barnhill on appeal are also made by Barnhill & Associates on appeal. For ease of discussion, we will refer only to Barnhill, though our discussion applies to Barnhill & Associates as well.

Associates, P.C. and would pay Williams's bills out of the trust account. In return for the services she received from Barnhill and Alfrey, Williams agreed to provide free hairstyling services to the two women.

In the early fall of 2005, Williams also met with Kevin Yeager, a CPA with whom Barnhill had advised her to speak. The parties disagree as to their expectations of Yeager's role in this matter. Barnhill asserts that she put Williams in touch with Yeager so that he could handle her income tax issues since Barnhill insists she never agreed to help Williams personally prepare her income taxes. Williams asserts that she met with Yeager to get an assessment of her financial situation and to look into whether she should file for bankruptcy. Williams terminated Yeager's services after meeting with him approximately two times. Williams informed Barnhill that she was not planning to continue to meet with Yeager. Williams testified that Barnhill replied, "It doesn't matter because we're already on to other things."

After Yeager was no longer part of their plan, Williams signed a power of attorney on November 22, 2005, that authorized Barnhill to act for Williams in "the following tax matters," at which point boxes on the form were filled in indicating income tax form 1040 for 2003 and 2004. Williams testified that she understood that Barnhill was going to handle her income tax delinquencies and any penalties that had accrued as a result of late payment. Williams testified that in December of 2005, at Barnhill's direction, she brought all of her financial information to Barnhill's office.

On January 21, 2006, Barnhill represented Williams at an administrative hearing regarding Williams's sales tax deficiency. Barnhill was able to prevent

the revocation of Williams's sales tax license. The parties agree that Barnhill handled Williams's sales tax problems to Williams's satisfaction.

On January 27, 2006, Williams executed a separate power of attorney that authorized Barnhill to represent Williams "for the following tax matters," at which point boxes on the form were filled in indicating state and sales tax, form 1040, and sales tax for all years needed.

Williams regularly brought her bills in to Barnhill's office and delivered or arranged for someone to pick up the income from her work at the salon. She eventually had her sales tax and car insurance bills sent directly to Barnhill's office. This arrangement continued for about a year, until February of 2007. Alfrey and Barnhill testified that over time, Williams's delivery of her income to the office became less frequent. They also testified that Williams did not deliver all of her income, but kept some of it to use as spending money. Williams testified that she brought in all of her money except for $100 per week, which she kept. On several occasions, she had Alfrey write her a check from the trust account so that she could make a payment or buy something she needed.

Williams testified that she never received any written balances or accountings related to her finances, but she trusted Barnhill to handle her financial problems. Alfrey testified that every time Williams brought money to the firm, she gave her a sticky note showing the amount of the deposit and her balance in the account.

Before Williams was a client of Barnhill, in approximately the summer of 2005, Barnhill learned that Alfrey had used the Barnhill & Associates' credit card to pay for personal expenses. Because Alfrey was a long-time employee,

Barnhill allowed her to remain with the firm but took some measures to prevent a repeat of the same kind of theft by Alfrey. She took Alfrey's name off the credit card, performed random audits, watched Alfrey carefully, and arranged for Alfrey to repay the stolen money. Williams testified that she had no knowledge of Alfrey's theft from the firm until February of 2007. Alfrey and Barnhill testified that Williams had full knowledge of this incident before she engaged the services of Alfrey and Barnhill in September of 2005.

On February 16, 2007, Barnhill discovered that Alfrey had taken money again, this time from her and her family conservatorship. Barnhill testified that Alfrey committed this second incident of theft by extending the firm's line of credit on its checking account, depositing the draws on the line of credit into the firm's account, and writing checks from the firm's account for personal use. Alfrey allegedly accomplished these thefts by signing Barnhill's name to the checks she wrote on the firm's account. Barnhill terminated Alfrey's employment with the firm.

Williams testified that she met with Barnhill immediately after Alfrey was fired, and Barnhill told her that Alfrey had stolen money from her again. Williams testified that Barnhill asked her to go through her files in Alfrey's office to determine "what [her] losses were" and "how much damage had been done." Barnhill gave Williams her files and the check registry for the trust account so that Williams could "figure it out." The trust account check registry had a running balance for each transaction until roughly the time when Williams first started bringing her income and bills to the firm. From that point in time on, the trust account check registry did not show a running balance.

After looking at all of the records, Williams claimed that between December of 2005 and February of 2007, she turned over income to the Barnhill firm that was not deposited into the trust account. She testified that she could calculate her income using her appointment books and estimate the amount of money missing from the trust account. At trial, the court admitted into evidence Williams's appointment book from March of 2006 through February of 2007. Williams testified that during the fifteen-month period in which she was taking her bills and income to the Barnhill firm, her appointment books showed an income of $94,924.95, but this figure would not have included tips, services added during an appointment, or income from selling product. She further testified that she kept $100 per week from her earnings, but she had turned the rest of her income over to the Barnhill firm. She also testified that she deposited with the Barnhill firm $3525.12 she had received for child support.

Williams reduced her hours in January of 2006, but she testified that after reviewing her appointment books she did not believe this change had reduced her income. Williams also asserted that a review of her income tax returns admitted into evidence supported her argument that her funds had been misappropriated. In 2003, Williams earned $79,923. In 2004, she earned $98,254. In 2005, at the end of which Williams began depositing money with Barnhill, she earned $89,594. In 2006, when Williams alleges she took all of her income to Barnhill's firm, she showed income of $55,706. In 2007, she earned $77,490. In 2008, she only earned $68,804, but she testified that she missed a large amount of work that year because of health issues.

Williams further testified that after Alfrey was terminated, she found between two and three hundred envelopes in Alfrey's office that contained her unopened bills. A friend who helped Williams review the firm's records testified that the files contained "a very large number" of unopened envelopes. Williams testified that it did not appear as though anyone had touched her file since she first dropped it off at the firm in 2005. She discovered that many of her bills, including her car insurance, had gone unpaid for months. She had never filed 2004 or 2005 income tax returns and accordingly was assessed penalties and interest.

On October 9, 2007, Williams filed a petition alleging several causes of action against Barnhill, Alfrey, and Barnhill & Associates. A jury returned a verdict against Barnhill and Barnhill & Associates on Williams's claims of breach of contract, breach of fiduciary duty, conversion, and fraud. The jury also found against Alfrey on Williams's claims of conversion and fraud and found that Barnhill & Associates was vicariously liable for the acts of Alfrey. The jury awarded Williams actual damages of $53,895 in lost money and $5000 for tax penalty and interest. The jury further assessed punitive damages against Barnhill in the amount of $10,000; against Barnhill & Associates in the amount of $15,000; and against Alfrey in the amount of $5000.

Barnhill, Barnhill & Associates, and Alfrey filed motions for judgment notwithstanding the verdict and for new trial. The district court denied these motions.

Barnhill, Barnhill & Associates, and Alfrey appeal, arguing: (1) because the claim for money damages was speculative, it failed as a matter of law, and

the district court should have rejected the jury verdict; and (2) the district court should have set aside punitive damages. Appellants also argue that there was not substantial evidence as to the different elements of Williams's causes of action. Williams requests appellate attorney fees.

II. Standard of Review

We review rulings on motions for directed verdict and for judgment notwithstanding the verdict for errors at law. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). If there is substantial evidence to support the claim or defense, the judgment notwithstanding the verdict should be denied. *Id*. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Id*. When considering a motion for judgment notwithstanding the verdict, we—like the district court—must view the evidence in the light most favorable to the party against whom the motion is directed. *Id*.

We review the district court's denial of a motion for a new trial based on a claim the jury awarded excessive damages for an abuse of discretion. *WSH Prop., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree. *Id.*

III. Substantial Evidence of Liability

A. Breach of Contract—Barnhill

Barnhill argues on appeal that Williams failed to present substantial evidence to prove her breach of contract claim. In her breach of contract claim Williams must prove: (1) the existence of a contract; (2) the terms and conditions

of the contract; (3) that she performed all the terms and conditions required under the contract; (4) Barnhill's breach of the contract in some particular way; and (5) that Williams suffered damages as a result of the breach. *Molo Oil v. River City Ford Truck Sales*, 578 N.W.2d 222, 224 (Iowa 1998).

First, Barnhill argues that Williams failed to prove Barnhill had contracted to complete Williams's income tax returns. We disagree. Williams testified that Barnhill agreed to prepare her already late income tax returns. Barnhill admitted at trial that she had agreed to handle Williams's tax returns "when she was ready." Alfrey testified that she informed Barnhill that Williams wanted Barnhill to prepare her federal income tax returns, and Barnhill responded that Williams needed to bring in the information. She also testified that Barnhill was aware that Williams later brought some of that information to Barnhill & Associates. Further, Williams executed two powers of attorney prepared pursuant to Barnhill's instructions authorizing Barnhill to represent her on her income tax matters.

Barnhill next claims that Williams's failure to have Yeager complete her income tax returns as Barnhill suggested defeats her claim of breach of contract. We disagree. Barnhill was aware that Williams did not intend to have Yeager complete her tax returns. At a hearing regarding Williams's sales tax, Barnhill acknowledged that she would be taking over Williams's finances because her prior arrangement with Yeager "did not work out." Barnhill cannot now claim that she believed that Yeager would complete Williams's tax returns.

Barnhill also claims that Williams could not afford to file her tax return because she could not afford to pay the taxes. Assuming this to be true, Barnhill still could have filed Williams's taxes and arranged to pay the amount due when

Williams's finances allowed. Thus, Barnhill's defense that Williams could not pay the tax she owed does not mitigate Barnhill's failure to fulfill her duty to prepare the tax return.

We also find that Barnhill agreed to manage Williams's finances by collecting her income and using it to pay her bills. Williams testified that she had contracted for this arrangement with Barnhill. Barnhill testified to this arrangement, stating that she was going to use the firm trust account to collect Williams's money and pay her debts.

After a review of the record, we find there was substantial evidence to support the jury's finding that Barnhill breached her contract with Williams. Because Barnhill did not pay Williams's bills or prepare her income tax returns, the jury reasonably found that Barnhill was liable for breach of contract and proceeded to consider damages.

B. Breach of Fiduciary Duty—Barnhill

Barnhill argues Williams did not present substantial evidence to prove her claim of breach of fiduciary duty. We disagree.

> Attorneys are in a fiduciary relationship with their clients requiring open and honest communication to ensure effective representation. The relationship between a client and an attorney . . . [is] one of [t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.

Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 820 (Iowa 2007) (internal quotations and emphasis omitted). We cannot find that Barnhill was open and honest with Williams when she agreed to manage her financial problems but chose not to inform her that Alfrey, who would be handling

all of Williams's finances, had recently been caught embezzling from the firm. We have stated in the context of a fraud claim that a "misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984). Similarly, in the context of a fiduciary relationship, we find that Barnhill's suppression of the truth regarding Alfrey's prior dishonest use of the firm's money was a misrepresentation of a material fact in violation of her fiduciary duty. Barnhill further violated her duty to Williams as her counsel by failing to adequately supervise Alfrey's handling of Williams's money and of the firm's trust account in light of Alfrey's history of misappropriation of the law firm's funds.

We find Barnhill's argument that Alfrey's subsequent misconduct was not foreseeable to be without merit. Barnhill's decision to leave Alfrey in a position that would allow her access to Williams's money imposed a duty on Barnhill to inform Williams of Alfrey's prior misconduct. After a review of the record, we find there was substantial evidence to support the jury's finding that Barnhill breached her fiduciary duty to Williams.

C. Conversion—Alfrey

Alfrey argues that Williams presented no evidence from which the jury could have inferred there was an act of conversion on her part. "Conversion is the wrongful control or dominion over another's property contrary to that person's possessory right to the property." *Blackford v. Prairie Meadows Racetrack & Casino, Inc*., 778 N.W.2d 184, 188 (Iowa 2010) (internal quotations omitted).

Williams testified that she brought all of her income to deposit in Barnhill's trust account except for $100 per week. Williams testified, based on her appointment book, part of which was admitted at trial, that she earned roughly $94,925.95 during the fifteen months in which she brought her income to Barnhill & Associates. She also testified that on top of her fees for services, she would have earned tips between fifteen and thirty percent and she would have received money from product sold. The district court admitted an exhibit at trial showing that in 2006, Williams purchased $5567.22 of product. Williams testified that she sold forty percent of the product she had purchased at a 100% markup.

However, Williams's income tax return for 2006 based on the information from Barnhill's trust account shows a gross income of only $55,706, an amount substantially lower than her income in surrounding years.[2] Williams argues that the difference between the money she claims she earned, and the money reflected on her tax return represents money that was never deposited into the trust account or was misused by Alfrey. This claim is further supported by Barnhill's admission at trial that some of Williams's income was deposited into the firm's checking account rather than the trust account. Though Alfrey denies that she took any of Williams's money, this was a fact issue for the jury to decide based on its assessment of the credibility of the witnesses. Our system commits to the jury questions of the reliability and credibility of witnesses. *See State v.*

[2] We are not persuaded by Barnhill's argument that Williams's signature on her 2006 tax return was an admission that her income that year was limited to $55,706. Williams filed her tax return at a time when her financial situation was uncertain because of the events that led to this lawsuit. Williams filed her tax return based on the most reliable information available to her at the time—Barnhill's trust account records. Williams testified that she would amend her tax return once she could more accurately determine her income.

Walton, 424 N.W.2d 444, 448 (Iowa 1988). Williams presented substantial evidence from which the jury concluded Alfrey converted some of Williams's money and proceeded to consider damages.

IV. Damages

Appellants argue that Williams cannot succeed on any of her causes of action because she failed to prove damages.

The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996). However, "[t]here is a distinction between proof that a party has suffered damages and proof regarding the amount of those damages." *Id*. "If the record is uncertain and speculative whether a party has sustained damages, the fact finder must deny recovery." *Id*. "But if the uncertainty is only in the amount of damages, a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Id*. Even if it is difficult to ascertain the amount of damages with any precision or certainty, that alone is not a basis for denying recovery. *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990). Damages should not be denied so long as there is evidence that some damages were sustained. *Palmer v. Albert*, 310 N.W.2d 169, 174 (Iowa 1981).

As set out above, Williams offered evidence to prove the amount of damages she sustained as a result of Barnhill's alleged failure to manage her finances and Alfrey's alleged conversion. In addition to the damages listed above, Williams provided evidence regarding the amounts of penalty and interest for late filing her income tax returns. Williams's evidence was sufficient to

establish that damages were sustained and to allow the jury to approximate the amounts.

Williams presented sufficient evidence to generate a jury question as to her breach of contract claim against Barnhill and Barnhill & Associates and her claim of conversion against Alfrey.[3] She also established that she had sustained damages and provided a reasonable basis from which the jury could approximate damages.

The amount of damages awarded is a jury function. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999). The jury's verdict should not be set aside or altered unless it (1) is flagrantly excessive or inadequate; (2) is so out of reason as to shock the conscience or sense of justice; (3) raises a presumption it is the result of passion, prejudice, or other ulterior motive; or (4) is lacking in evidential support. *Id.* None of those factors is present here. The district court properly denied Barnhill's motion for judgment notwithstanding the verdict.

V. Punitive Damages

Appellants also argue that the punitive damages against them should be set aside.

Punitive damages may only be awarded when the plaintiff shows "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights . . . of another." Iowa Code § 668A.1(1)(a) (2007).

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[3] Because we find that Williams proved at least one of her claims against each of the appellants and the amount of damages, we conclude that she was entitled to the damages awarded by the jury. We therefore need not address appellants' arguments that relate to Williams's claim of fraud.

> Willful and wanton conduct is shown when an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525, 529 (Iowa 2007) (internal quotations omitted). More than negligent conduct is required to support a punitive damage award. *Id.* Punitive damages are only recoverable when the defendant acted with actual or legal malice. *Id*. "Actual malice may be shown by such things as personal spite, hatred, or ill-will and legal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another." *Id.*

A. Alfrey

Substantial evidence supports the jury's award of punitive damages against Alfrey. As discussed above, Williams's testimony and evidence engendered a jury question as to whether Alfrey had misappropriated the money Williams entrusted to her. The jury found that Alfrey converted Williams's money for personal gain, a verdict of intentional misconduct that supported a further finding of a willful and wanton disregard of Williams's rights. The district court did not abuse its discretion in declining to set aside this award of punitive damages.

B. Barnhill and Barnhill & Associates

Barnhill argues that the punitive damage awards against her and her firm were "excessive and clearly [were] influenced by the passion and prejudice of the jury" against her, as evidenced by the fact that the jury awarded punitive damages against Barnhill and Barnhill & Associates two and three times greater than the punitive damages against Alfrey.

Williams argued at trial that punitive damages were justified in this case because: (1) Barnhill, who served in a fiduciary capacity, did not inform Williams that she was going to allow Alfrey, who had previously mishandled the firm's money, to manage Williams's finances without supervision or audit; and (2) Barnhill & Associates willfully and wantonly continued to permit an employee who was untrustworthy to handle a client's finances and access the trust account. The jury agreed, and so do we.

We do not believe that the punitive damages awarded against Barnhill and Barnhill & Associates are excessive or result from the jury's passion or prejudice. Williams produced evidence showing that, in spite of knowing that Alfrey had recently embezzled money from Barnhill & Associates, Barnhill retained Alfrey as an employee and even put her in charge of Williams's money and the firm's trust account. Barnhill, as the owner and president of Barnhill & Associates, allowed Alfrey to sign Barnhill's name on checks and manage that account, performing only random audits. The jury could have found that this conduct constituted more than negligence on Barnhill's part and amounted to a reckless disregard for Williams's rights. Further, in determining the amount of punitive damages, the jury may have considered Barnhill's greater ability to pay in comparison to Alfrey. *See Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 424 (Iowa 1977) (holding courts may admit evidence of a defendant's ability to pay punitive damages to determine the amount of damages necessary to punish a particular defendant).

"An employer . . . acts recklessly if it realizes that there is a strong probability that certain consequences will result from an act or that a reasonable

person in its position would know of that probability." *Seraji v. Perket*, 452 N.W.2d 399, 402 (Iowa 1990).

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
> (a) the principal authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal was reckless in employing him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of his employment, or
> (d) the principal or the managerial agent of the principal ratified or approved the act.

Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983) (citing Restatement (Second) of Torts § 909 (1979)).

The jury could have concluded from the evidence presented that Barnhill and Barnhill & Associates should have known that there was a strong probability that Alfrey might mismanage money if retained in a managerial capacity, given her prior actions of dishonesty with the firm's money. Therefore, the jury could have found that Alfrey was unfit to be managing clients' money and the firm's trust account, Barnhill was reckless in employing her in that capacity, and Barnhill was vicariously liable for punitive damages.

Even if Barnhill had not been reckless in her employment and supervision of Alfrey, she and the law firm were subject to punitive damages.

> Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, *the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions*.

Restatement (Second) of Torts § 909 cmt. b, at 468 (1979) (emphasis added).

We conclude the district court did not abuse its discretion in declining to set aside the award of punitive damages. The award was not excessive, nor did it raise a presumption of prejudice.

VI. Appellate Attorney Fees

On appeal, Williams requests an award of appellate attorney fees. Barnhill asserts that appellate attorney fees are not allowed in a civil case unless they are authorized by statute or contractual agreement. We need not consider this argument because we decline to award appellate attorney fees.

AFFIRMED.