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Four opinions, three justices, the 2nd District

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In four opinions issued late last week the 2nd District Appellate Court clarified the duties owed and liabilities of lawyers and reinforced important summary judgment procedures. The oral argument of these cases were all heard and decided by Justices George Bridges, Kathryn E. Zenoff, and Joseph E. Birkett.

Three of those cases were discussed in this space on April 28, and all of the cases were discussed on Episodes 24, 27, and 31 of the Podium and Panel Podcast.

In likely the most important and far-reaching decision of this group of cases, as it affects firms large and small, the court in *Khoury v. Niew*, 2021 IL App (2d) 200388, held in reversing the trial court's entry of summary judgment that "[w]hile attorneys clearly owe their clients a fiduciary duty that encompasses obligations of fidelity, honesty, and good faith (*Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 44), the trial court went too far in reasoning, without qualification, that every attorney at a firm has a fiduciary duty to all the firm's clients." 2021 IL App (2d) 200388, Para. 51. The defendant lawyer was the president of a small firm in which his wife owned 100% of the stock of the firm, and she was alleged to have stolen client funds from the firm's IOLTA.

The plaintiff contended the existence of a fiduciary duty with the defendant lawyer, but he never had any meaningful interaction with that lawyer. Nonetheless, the court found the defendant lawyer owed a fiduciary duty to the plaintiff based, in part, on the requirements of Rule 5.1 of the Rules of Professional Conduct to supervise subordinates.

In reversing the trial court and entering summary judgment in favor of the defendant lawyer, the appellate court rested part of its decision on the principle that "a violation of the Rules does not establish a separate duty or give rise to a cause of action. *Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶ 34; see Ill. R. Prof'l Conduct (2010) Preamble (eff. Jan 1, 2010) ('Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. … [The Rules] are not designed to be a basis for civil liability.')"

In *Crowe v. Taradash*, 2021 IL App (2d) 200316-U, the court also addressed the scope of a lawyer's fiduciary duty in a case in which the plaintiff claimed that the defendant lawyer's assurances about the propriety and sufficiency of a workers' compensation settlement constituted fraudulent concealment. Mirroring the failed theory in *Barratt v. Goldberg*, 296 Ill.App.3d 252 (1st Dist. 1998), and echoing a point he made several times at the oral argument, Birkett, writing for the court, stated "[w]hatever the scope of defendants' fiduciary obligation, it did not extend to telling [the plaintiff] that he had a cause of action against them for malpractice. See *Fortune v. English*, 226 Ill. 262, 269 (1907); *Carlson v. Fish*, 2015 IL App (1st) 140526, Par. 45."

The lesson to be drawn from *Camelot Inc. v. Burke Burns & Pinelli*, 2021 IL App (2d) 200208, is that if an alternative fee arrangement is going to be relied upon, it must be clear as to what is meant by its terms, else a

firm is at risk of not being paid its full claimed fee for over 25 years and having to spend six years of litigation to find that out. The issue was what the term 20% of the amount recovered in the underlying litigation meant, and through the introduction of parole evidence, it was argued successfully to the trial court that it meant the sale price of the property at issue in the underlying dispute. Applying the manifest weight of the evidence standard of review, the court affirmed the ruling of the trial court in favor of the client that because the property had not been sold, the 20% of the value was not owed by the client.

Finally, in *Bruning and Associates, P.C. v. Eversman*, 2021 IL App (2d) 200502-U, which is a summary judgment case masquerading as a legal malpractice case, the court affirmed the judgment in favor of the defendant law firm related to alleged negligence in the handling of a divorce matter. The court stated:

"Eversman failed to file any affidavit under Rule 191(b). Indeed, Eversman makes no reference at all to Rule 191(b) in his briefs on appeal, arguing only generally that the case was 'not at the expert disclosure stage' and that, because he 'requested leave to obtain an expert affidavit,' he should have been granted time to disclose one. That does not explain his failure to comply with Rule 191(b). In addition, as noted, Rule 191(b) requires certain disclosures. Eversman did not even attempt to name any proposed expert, telling the trial court at the hearing that they 'don't have the expert yet.' Nor did Eversman attempt to show what an expert would testify to if sworn, stating only generally that 'all of these issues that are being brought up [by Bruning] require expert testimony.'"

The court continued, holding that "a response to a motion for summary judgment is not the proper vehicle to assert new factual allegations that should have been included in the underlying complaint. 'When ruling on a motion for summary judgment, the trial court looks to the pleadings to determine the issues in controversy. [Citation.] If a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint. [Citation.]' [Citation.] Clearly, the trial court could not deny summary judgment upon unpleaded theories of legal malpractice that were raised, for the first time, in opposition to the motion for summary judgment. Thus, we reject plaintiff's suggestion that he raised issues of fact precluding summary judgment.' *Abramson v. Marderosian*, 2018 IL App (1st) 180081, ¶ 55."

These cases are important both procedurally and substantively and should instruct lawyer conduct and practice.
