UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARK EVANS PULLEN,	)	CASE NO. 07-65415 - MHM
MARY KAY PULLEN,	)	
	)	
Debtors.	)	
	)	
MARK EVANS PULLEN,	)	
MARY KAY PULLEN,	)	
	)	
Plaintiffs,	)	
v.	)	**ADVERSARY PROCEEDING**
	)	**NO. 07-6220**
REX P. CORNELISON, III,	)	
JOHN A. ZIOLO,	)	
CORNELISON & ZIOLO, LLP,	)	
	)	
Defendants.	)	

ORDER SPECIFYING DAMAGES

By order entered March 31, 2009, Defendants were found to be liable to Plaintiffs for professional malpractice (Doc. No. 35) (the "Liability Order"). On July 7, 2010, hearing was held on damages (the "Hearing"). Present at the Hearing were Plaintiffs' attorney and Plaintiffs. No one appeared on behalf of Defendants. Both Plaintiffs testified about the damages suffered as a consequence of Defendants' malpractice.

FINDINGS OF FACT

The factual background and circumstances surrounding the finding of liability of Defendants is set forth in some detail in the Liability Order. Briefly, as a result of Defendants' malpractice, a levy and sale of the one-half undivided interest of Plaintiff Mark E. Pullen ("Mr. Pullen") in the residence of Plaintiffs took place August 1, 2006

(the "Sale"). Plaintiffs spent the next three years in tangled and often rancorous litigation fending off attempts to dispossess them of their real property and attempting to set aside the Sale (the "Property Litigation").

Mr. Pullen testified about the initial interview with Defendants in which Defendants and Mr. Pullen discussed the past conduct of the attorney instigating the Sale. Defendants noted that Plaintiffs appeared to be confronted with a "mad dog" attorney who was interested only in pursuing Plaintiffs' house to recover a judgment entered against Mr. Pullen in 1997. Mr. Pullen explained that during the three years of the Property Litigation, Plaintiffs were threatened and harassed by the "mad dog" attorney[1] and were constantly concerned about what might happen next.

Mr. Pullen testified that Plaintiffs paid Defendants $2,500 for the legal services that were examined in the Liability Order and found to constitute malpractice. Additionally, as a result of the failure of Defendants to prevent the Sale, Plaintiffs became mired in three years' of Property Litigation and incurred legal fees to Plaintiffs' current attorney of $13,000. Mr. Pullen was forced to miss work 10 to 12 times to consult with his attorney and to attend hearings. Missed work caused Mr. Pullen, who is self-employed, to lose both revenue and clients and to suffer damage to his professional reputation. Each absence from work to pursue the Property Litigation forced Mr. Pullen to travel approximately 30-40 minutes (each way) to his new attorney's office or to court. Generally, office visits would last about 1-2 hours and attendance at court hearings would often last all day.

Mary Kay Pullen ("Mrs. Pullen") corroborated Mr. Pullen's testimony and testified about the damages she had suffered. Mrs. Pullen explained that while the three years of Property Litigation caused her to miss work infrequently, this relative deficiency, as

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[1] Mr. Harris's actions are described in the *Order Regarding Debtors' Motion For Contempt for Violation of the Automatic Stay.* (Case No. 07-65415, Doc. No. 177). Mr. Harris was ordered to pay $2,500 in sanctions.

compared to Mr. Pullen, is owed exclusively to the fact Mrs. Pullen is a nurse and works only at night. Trips during the day, to the new attorney's office or to court, thus prevented Mrs. Pullen from sleeping between night shifts. Mrs. Pullen further explained that, for a nurse, a lack of sleep between shifts is both dangerous and frustrating.

Both Mr. and Mrs. Pullen testified about the fear, uncertainty and aggravation attendant to living in a house where a one-half undivided interest has been conveyed to a third party. They explained the anguish of never knowing when someone might appear to harass, threaten, or otherwise disturb their quiet enjoyment of the residence again.

CONCLUSIONS OF LAW

Legal Malpractice

In an action for legal malpractice, the burden of proof is on the plaintiff to establish each of three elements: (1) the defendant attorney agreed to provide the plaintiff professional services (*i.e.*, "duty"); (2) the defendant attorney failed to exercise ordinary care, skill, and ability (*i.e.*, "breach"); and (3) such failure on the part of the defendant attorney was the cause of injury to the plaintiff (*i.e.*, "damage"). *See e.g. Oehlerich v. Llewellyn,* 285 Ga. App. 738, 740 (2007); *Kidd v. Ga. Ass'n of Educators, Inc.*, 263 Ga. App. 171, 173 (2003); *Whitehead v. Cuffie,* 185 Ga. App. 351, 352 (1987). The Liability Order found Defendants' negligent legal representation of Plaintiffs constituted malpractice. The first two elements are thus satisfied, leaving only the question of damages.

Measure of Damages for Legal Malpractice Claims

Georgia law allows a plaintiff to pursue contract damages in cases involving a breach of duty implied by reason of a contractual relation. *Hamilton v. Powell, Goldstein, Frazer & Murphy,* 167 Ga. App. 411, 413 (1983). In such cases, a plaintiff may choose instead to pursue recovery in tort if a breach of duty is imposed by law in addition to the duty imposed by the contract itself. *Id.*

In legal malpractice cases, the duty breached is both a contractual and legal duty. Absent an express agreement, actions by an attorney on the client's behalf constitute an implied contract, implicitly warranting that the attorney possesses the requisite care, skill, and ability to practice law. *See Scott v. Simpson,* 46 Ga. App. 479 (Ga. Ct. App. 1933). The law also imposes upon attorneys "the obligation to exercise a reasonable degree of care, skill and ability," such as is ordinarily employed by other members of their respective profession. *Covil v. Robert & Co. Assocs.,* 112 Ga. App. 163, 166-167 (1965). Damages for legal malpractice are thus recoverable both in contract and in tort. *Wolfe v. Virusky,* 306 F. Supp. 519, 520 (S.D. Ga. 1969); *Scott v. Simpson,* 46 Ga. App. 479 (1933).

In Georgia, nominal damages are available by statute in both contract and tort actions. With respect to contract damages: "In every case of breach of contract the injured party has a right to damages, but if there has been no actual damage, the injured party may recover nominal damages sufficient to cover the costs of bringing the action." O.C.G.A. § 13-6-6. The statute defining tort damages similarly explains: "If an injury is small or the mitigating circumstances are strong, nominal damages only are given." O.C.G.A. § 51-12-4. Synthesizing and consolidating each of these references reveals nominal damages to be damages available when no actual damages can be shown, flowing directly from the breach itself.

Actual damage is defined as: "An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." BLACK'S LAW DICTIONARY 394 (7th ed. 1999); *Baker v. Eichholz,* 2008 U.S. Dist. LEXIS 20635, 2008 WL 717777 (S.D. Ga., Mar. 17, 2008); *DeJong v. Stern,* 162 Ga. App. 529 (1982). While the term "actual damages" is not employed by the Georgia Code, damages falling within the

concept of "actual" are included and categorized as either punitive[2] or compensatory. *Baker v. Eichholz,* 2008 U.S. Dist. LEXIS 20635 (S.D. Ga. Mar. 17, 2008). Compensatory damages are thus an appropriate form recovery when actual damage is proved.

In Georgia, compensatory damages are divided into two broad categories: (1) general damages and (2) special damages. O.C.G.A.§ 51-12-2 defines both of these categories:

(a) General damages are those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount.

(b) Special damages are those which actually flow from a tortious act; they must be proved in order to be recovered.

Despite the consolidation of both definitions in a single section, general and special damages are clearly distinguishable – they are related, but distinct forms of recovery.[3] As special damages must be plead with particularity (*i.e.*, in a specific dollar amount), they are appropriate only when actual damage can be quantified in terms of pecuniary loss. *See Torok v. Yost,* 194 Ga. App. 94 (1989); *Kennedy v. Johnson,* 205 Ga. App. 220, 221 (1992). Not all actual damage, however, is pecuniary and some injury, such as pain and suffering, is generally not easy to quantify. *Georgia S. & F. R. Co. v. Wright,* 130 Ga. 696, 697 (1908), *citing Head v. Georgia P. R. Co.,* 79 Ga. 358, 360 (1887). In situations where actual damage is shown and "the monetary value of the injury is difficult to calculate," general damages are appropriate because they do not require

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[2] Punitive damages are those awarded upon clear and convincing evidence that a defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. *O.C.G.A. § 51-12-5.1.* Punitive damages require a "willful" component and are thus inappropriate in an action for legal malpractice premised on mere negligence.

[3] General and special damages are related in that recovery of either is contingent upon proof of actual damage; neither protects the abstract value or importance of a right. *Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 310 (1986).

proof of amount. *Slicker v. Jackson,* 215 F.3d 1225, 1231 (11th Cir. 2000), *citing Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 307 (1986).

At trial, a plaintiff bears the burden of proving damages in a manner capable of allowing a trial judge to calculate appropriate compensation with sufficient certainty – damages cannot be based on guesswork. *Lester v. S. J. Alexander,* 127 Ga. App. 470, 471 (1972). Legal malpractice actions may be brought in both tort and contract. Therefore, in legal malpractice actions a plaintiff may satisfy this burden using the contract and tort damage provisions of Georgia Code. Because Defendants have been found liable for negligent malpractice, both the contractual and legal duties owed to Plaintiffs were breached. Plaintiffs have testified to both pecuniary loss and pain and suffering. These injuries constitute actual damage.

A plaintiff may recover compensatory damages for any injuries proximately caused by defendant's breach. To establish proximate cause in a legal malpractice action, a plaintiff must show that "but for the attorney's error, the outcome in a given case would have been different." *Kidd v. Ga. Ass'n of Educators, Inc.,* 263 Ga. App. 171, 173 (2003). Generally, an intervening "act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury." *Cope v. Enter. Rent-A-Car,* 250 Ga. App. 648, 652 (2001). This causal shift would break the connection between a defendant's breach and a plaintiff's injuries.

Foreseeable intervention, however, changes the result completely. Actions of a third person, "intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen." *Southern R. Co. v. Webb,* 116 Ga. 152, 156 (1902); *see also Cope v. Enter. Rent-A-Car,* 250 Ga. App. 648, 652 (2001). When third party intervention ought to have been foreseen, "the original negligence remains a culpable and direct cause of the injury." *Southern R. Co. v. Webb,* 116 Ga. 152, 156 (1902). Therefore, a defendant remains liable for any damage caused to a plaintiff through the foreseeable intervention of

a third party. In this proceeding, Defendants were aware of the litigious and aggressive tendencies of the "mad dog" attorney pursuing Plaintiffs' property. Mr. Pullen's initial visit to Defendants was a plea to protect him and his wife from the consequences of a levy and sale of Mr. Pullen's interest in their residence and the Sale is exactly what Defendants failed to prevent. All the litigation, damage to Mr. Pullen's business, anguish of Mrs. Pullen and interference with Plaintiffs' quiet enjoyment of their property flowed directly and foreseeably from Defendants' malpractice. *See Southern R. Co. v. Webb,* 116 Ga. 152, 156 (1902).

Plaintiffs testified to pecuniary loss: Plaintiffs paid $2,500 to Defendants for legal representation. Defendants' malpractice forced Plaintiffs to spend an additional $13,000 to a new attorney to regain Mr. Pullen's interest in the residence that was lost at the Sale. Therefore, the $13,000 in legal fees incurred by Plaintiffs is a pecuniary loss for which special damages are appropriate.

Plaintiffs also testified about actual other damages, which are more difficult to quantify (*i.e.*, general damages). Plaintiffs spent three years in litigation to unwind the Sale that, but for Defendants' negligent malpractice, would have been avoided. During these three years, Mr. Pullen lost both revenue and clients and suffered a diminished professional reputation. Mrs. Pullen suffered by daytime court appearances and conferences with her attorney from working night-shifts with little or no sleep in between. Throughout the three years of litigation, Plaintiffs were also subject to threats and harassment from Mr. Harris.

In *Jankowski v. Taylor*, a defendant's negligent malpractice resulted in the dismissal of plaintiff's case. *Jankowski v. Taylor, Bishop & Lee,* 246 Ga. 804 (1980). The court held: "After the dismissal, there was no lawsuit pending, court costs would be cast upon the plaintiff and obvious delays would be occasioned in having the cause of action adjudicated. These factors among others are damages. They are, in fact, more than nominal damages and can be described as being appreciable." *Id.* at 806.

The plaintiff in *Baker v. Eichholz* claimed as damages from a defendant's negligent malpractice "a delay in recovery on his claim for more than two years" and "needless expenditure of a great deal of time, energy, and resources." 2008 U.S. Dist. LEXIS 20635 (S.D. Ga. Mar. 17, 2008). Applying *Jankowski*, the court held plaintiff's damages more than nominal – they were appreciable. *Id.*

Jankowski and *Baker* establish that delay and needless expenditure of time, energy, or resources, constitute "appreciable" damage. In Georgia, damages are awarded as compensation for injury that is "of a character capable of being estimated in money." O.C.G.A. § 51-12-4. The term "appreciable" has been defined as "being capable of being measured or perceived." BLACK'S LAW DICTIONARY 110 (8th ed. 2004). Therefore, because Defendants' negligent malpractice has subjected Plaintiffs to delay and needless expenditure of time, energy and resources, Plaintiffs have suffered appreciable damage.

CONCLUSION

While the $13,000 in pecuniary loss suffered by Plaintiffs is readily quantifiable, the majority of Plaintiffs' injury is not as readily quantifiable but is appreciable. Damage that is not readily quantifiable significantly complicates the burden of calculating appropriate compensation with certainty. *See Lester v. S. J. Alexander,* 127 Ga. App. 470, 471 (1972). The income and value of Mr. Pullen's business can be estimated based upon the information disclosed in Plaintiffs' bankruptcy Schedules.[4] As a general precept, however, the measure of general damages is the enlightened conscience of a fair and impartial trier of fact. *Phillips v. Singleton,* 245 Ga. App. 788, 789 (2000). In determining the amount of damages to award to Plaintiffs, consideration has been given to the injury to Mr. Pullen's business and his loss of income, Mr. and Mrs. Pullen's expenditure of time and energy in connection with the Property Litigation, and the

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[4] Section 521(a) and Bankruptcy Rule 1007(b) require a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules").

disturbances to Plaintiffs' quiet enjoyment of their property, in addition to the quantifiable pecuniary loss. Accordingly, it is hereby

ORDERED Plaintiffs are entitled to compensatory damages in the amount of $42,900.00.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiffs' attorney, Defendants' attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 4th day of August, 2010.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE