

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-948

BUDD F. HEALY

vs.

GEORGE HAMMOND.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff timely appeals from a judgment entered in the Superior Court on a jury verdict for the defendant. On appeal, he maintains that the judge committed reversible error by (1) admitting certain evidence, (2) submitting a special verdict question, and (3) denying his requests for certain jury instructions. He also appeals from an order and judgment taxing costs pursuant to G. L. c. 261, § 1, and Mass. R. Civ. P. 54 (d), as appearing in 382 Mass. 821 (1980). In his cross appeal, the defendant claims error in the partial summary judgment entered in favor of the plaintiff on liability and in the denial of his cross motion for summary judgment. The plaintiff's attorney, Stephen J. Gordon, appeals from a corrected judgment ordering him to pay attorney's fees and costs to the defendant as a sanction for his misconduct.

Background. On July 10, 2012, Budd F. Healy and Lynn DiPietro filed a joint petition for divorce accompanied by a separation agreement drafted by Attorney George Hammond. After a colloquy, a Probate and Family Court judge found that the separation agreement dividing the marital assets was fair and reasonable. A judgment of divorce nisi entered on October 17, 2012, and became absolute on January 16, 2013.

In November 2014, Healy, represented by Attorney Gordon, commenced a modification proceeding in the Probate and Family Court, alleging, as herein relevant, that Healy had understood that Hammond represented him in the divorce proceeding. Following a three-day trial in April 2016, the same judge who had heard the parties' divorce found that they intended the separation agreement to operate as a complete and final settlement of the marital estate, and that given the absence of fraud and mutual mistake, Healy's petition for the division of undisclosed assets was precluded by that agreement. The judge reaffirmed her conclusion that "the separation agreement constituted a fair and reasonable division of assets." A modification judgment entered on August 26, 2016, ordering DiPietro to pay Healy general term alimony due to the changed circumstances, i.e., Healy's postdivorce diagnosis of alcohol-related dementia.

While the modification proceeding was pending, Attorney Gordon filed this legal malpractice action in the Superior Court. On October 6, 2016, Healy sat for a deposition that was suspended after twenty-five minutes on the recommendation of Gordon. On March 1, 2017, a forensic psychologist evaluated Healy and presented her findings to the court. After a guardian ad litem (GAL) was appointed, removed, and a successor GAL appointed, a judge found that Healy was incompetent to testify. Another judge subsequently allowed Healy's motion for partial summary judgment on liability, and denied Hammond's cross motion. She also allowed Hammond's motion for sanctions against Gordon. The issues of causation and damages were subsequently submitted to a jury on special questions. After a three-day trial in December 2018, a jury returned a verdict in favor of Hammond.

Summary judgment ruling. The crux of Healy's case was his assertion that Hammond violated his legal duty to Healy by improperly representing both him and DiPietro during their divorce proceeding. See Mass. R. Prof. C. 1.7, as appearing in 471 Mass. 1335 (2015) (rule 1.7). Healy alleged that as a result of Hammond's negligence, he did not receive an equitable share of the marital assets, which in the view of his expert amounted to fifty percent of the assets. In granting partial summary judgment for Healy on liability, the judge reasoned:

"Several admissions by Hammond indicate that his conduct in the divorce action violated the Massachusetts Rules of Professional Conduct for lawyers -- specifically Rule 1.7, which prohibits an attorney from representing clients between whom there is a conflict of interest. Simply put, a lawyer cannot represent both spouses in a divorce action. Here, defendant Hammond clearly did just that. There are several undisputed and material facts that make this matter ripe for summary judgment.

". . .

"Hammond has argued throughout the pendency of this matter that he is not liable to Healy because he advised him, on more than one occasion, to hire his own attorney for the divorce. Taking that as true, the Court agrees still with Healy that the advice does not give rise to a genuine issue of material fact. Here, that advice was not heeded, but as well, Hammond behaved toward Healy like counsel and did legal work for Healy. So, in fact and despite any disclaimers made, he acted as counsel to both Healy as well as counsel to [DiPietro]. As such, Hammond violated Rule 1.7 (a) and one of the most basic responsibilities of an attorney."

This was error. Summary judgment may enter only if the moving party establishes that "there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). See Helfman v. Northeastern Univ., 485 Mass. 308, 314 (2020). Here, Hammond denied at his deposition and in his answers to interrogatories that he had any agreement with Healy. Both Hammond and DiPietro testified that Hammond informed Healy several times that Hammond did not represent Healy and that Healy needed an independent attorney to review the separation

agreement.¹ Healy responded that he did not want or need an attorney. The motion judge ignored these materials and improperly found a key fact regarding dual representation against Hammond. Moreover, if Hammond did not represent Healy, as a jury could find, rule 1.7 was irrelevant to this case. See Fanaras Enters., Inc. v. Doane, 423 Mass. 121, 125-126 (1996). Even if Hammond owed a duty of care to Healy, a purported violation of the rule only constitutes some evidence of negligence, and not negligence per se. See Fishman v. Brooks, 396 Mass. 643, 649-650 (1986); Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 141 (1996). The judge also erred by deciding the issue of Hammond's negligence as matter of law on liability without resolving the element of causation, an essential element of Healy's malpractice claim.² See Greenspun v. Boghossian, 95 Mass. App. Ct. 335, 339 (2019); Atlas Tack Corp. v. Donabed, 47 Mass. App. Ct. 221, 226 (1999); Mass. R. Civ. P. 56 (c).

Sanctions against Gordon. In the circumstances of this case, the judge possessed the authority to sanction Gordon with an assessment of reasonable attorney's fees "only if [he] has

¹ Hammond also certified to the Probate and Family Court that he was the attorney of record for DiPietro alone.

² Acting on Hammond's emergency motion, the judge reversed herself and vacated her order requiring the parties to appear for an assessment of damages hearing.

engaged in misconduct that threaten[ed] the fair administration of justice and the sanction [wa]s necessary to preserve the judge's authority to administer justice." Wong v. Luu, 472 Mass. 208, 209 (2015). Not only were the judge's inherent powers limited in this respect, but the judge was required to exercise her powers "with restraint and discretion," both in deciding the question of whether a sanction was permissible and if so, in deciding its severity. Id. at 218. We review a sanction ruling for abuse of discretion. Id. at 220.

Here, the motion judge adopted Hammond's view of the case almost verbatim from his submissions. We are unable to determine from the judge's decision whether she considered Gordon's arguments or whether her ultimate findings and rationale were the product of her independent judgment. See Michelon v. Deschler, 96 Mass. App. Ct. 815, 816-817 (2020). Moreover, although the judge apparently limited the sanctions to the nine items she found related to Gordon's misconduct, she simply accepted the full amount purportedly incurred by Hammond in attorney's fees and costs as reasonable. On this record, we are unable to assess whether the judge exercised "restraint and discretion," Wong, 472 Mass. at 218, and "tailored [the monetary award] to the resources wasted or unnecessarily expended as a result of the misconduct." Avelino-Wright v. Wright, 51 Mass. App. Ct. 1, 5 (2001). See Clark v. Clark, 47 Mass. App. Ct.

737, 743 (1999) (reasonable costs may be imposed on attorney). A remand to the Superior Court is necessary for the judge to provide a further explanation of the reasoning undergirding the sanctions award, and to make findings on the reasonableness of each fee and sanction request she tied to Gordon's misconduct.³ See Michelon, supra at 817.

Jury instructions and verdict slip. The trial judge has a duty "to give full, fair, correct and clear instructions as to principles of law governing all the essential issues presented" (citation omitted). Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 611 (2000). "[A] judge enjoys significant latitude in framing the language of his [or her] jury instructions . . . and is not required to use the specific language requested by a party" Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275-276 (1990). As long as all significant matters are covered, the judge is not required to include "[e]very possible correct statement of law" in the charge. Hopkins, supra. The adequacy of the instructions must be assessed "as a whole." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 (2014). Our review of Healy's objections to the instructions and verdict slip is

³ Although Hammond's motion for sanctions was brought under Mass. R. Civ. P. 11 (a), as amended, 456 Mass. 1401 (2010), the judge decided it under her inherent powers. On remand, the judge may consider whether sanctions were warranted under that rule. See Cahaly v. Benistar Prop. Exch. Trust Co., 85 Mass. App. Ct. 418, 429 (2014).

for prejudicial error. See Dos Santos v. Coleta, 465 Mass. 148, 153-154 (2013); Commonwealth v. Springfield Terminal Ry. Co., 80 Mass. App. Ct. 22, 31 (2011).

We conclude that there was no error in the submission of the second special question to the jury.⁴ In this particular case, the jury were required to determine whether Hammond's negligence caused the division of assets by settlement in the underlying divorce proceeding to fall below a settlement amount that was fair and reasonable for Healy. See Fishman, 396 Mass. at 647 n.1. If any unfairness in the settlement was not caused by Hammond, Healy would have suffered no loss as a result of Hammond's negligence. To the extent that Healy objects to the reference to G. L. c. 208, § 34, as the trial judge noted, that statute established the legal framework to be applied by the jury in assessing whether Hammond's negligence caused Healy any harm. Indeed, Jerome Aaron, Healy's own expert, considered the

⁴ Answering special questions, the jury found that (1) Healy would have obtained a better result if separate counsel had represented him in the divorce proceeding; and (2) Healy did not prove that "the acts and/or omissions of the defendant, George Hammond, Esq., were a substantial cause of the Plaintiff, Budd F. Healy, receiving a share of the marital estate that was not fair and equitable in accordance with the factors set forth in G. L. c. 208, § 34." Because of their negative answer on question two, the jury did not reach the third question, which asked: "What total amount of money is necessary to compensate for any difference between the share of the marital estate received by the Plaintiff, Budd F. Healy, in 2012 and that share of the marital estate that would have been fair and equitable in accordance with the factors set forth under G. L. c. 208, § 34?"

eighteen statutory factors in formulating his opinion on causation and damages, and was questioned extensively on their application at trial. The trial judge also correctly instructed the jury on the four elements of a legal malpractice claim (and their duty to decide only the latter two). Nothing about the language or the judge's explanation of special question two increased Healy's burden of proof.

To the extent that Healy claims error in the omission of certain other instructions, in light of their subject matter or form, the judge was not required to give them. In short, Healy has not demonstrated prejudicial error in the inclusion of question two on the verdict slip or in the omission of any of his proposed instructions. Finally, we agree with the trial judge that the answers to the special questions were not inconsistent. The jury could have found that although Healy would have obtained a better settlement if he was represented by competent counsel, Healy's intentional decision to forego the "unneeded" representation was the cause of his loss.

Erroneous admission of evidence. We discern no abuse of discretion in the denial of Healy's motion to exclude the separation agreement and the transcript of the colloquy from evidence.⁵ See Commonwealth v. Evelyn, 485 Mass. 691, 706

⁵ At the colloquy on September 17, 2012, in the Probate and Family Court, Healy informed the judge that he had read the

(2020). The evidence was relevant to Healy's state of mind, his intentions regarding the parties' agreement, and the contested elements of causation and damages. Healy's statements made during the colloquy were admissions of a party opponent. See Zucco v. Kane, 439 Mass. 503, 507-508 (2003). It follows that Hammond's arguments to the jury concerning this relevant evidence did not constitute error.

Nothing in the case of Meyer v. Wagner, 429 Mass. 410 (1999), assists Healy's evidentiary argument. That case stands for the proposition that a settlement agreement approved by a judge in a divorce proceeding does not bar a client from bringing a subsequent legal malpractice action against the attorney who prepared the agreement and advised the client to sign it. Id. at 419-420. Healy was permitted to pursue his malpractice claim here. Hammond neither sought nor received the benefit of an application of judicial estoppel with regard to these documents or any others.

The trial judge was not required to invalidate the settlement agreement because "it arose out of a conflict of interest." The judge was warranted in concluding that the

separation agreement before he signed it, that he had signed it freely and voluntarily, and that he was satisfied with the settlement. After questioning Healy and DiPietro, the judge found that the separation agreement dividing the marital assets was fair and reasonable.

doctrine of "infectious invalidity" had no application, an argument waived by Healy on appeal. Healy points to no rule or statute that supports his argument (or that would preclude the agreement's admission).⁶

Litigation costs. The judge erred by taxing costs without first holding a hearing as requested by Healy and by failing to make the findings required to award costs. See Waldman v. American Honda Motor Co., 413 Mass. 320, 326-328 (1992). A remand is required for a hearing, and if reasonable costs are assessed, appropriate findings should be made to support them.

On the view we take of the case affirming the judgment on the jury verdict, there is no need for us to address the pretrial ruling denying Hammond's cross motion for summary judgment. Healy's request for attorney's fees and costs in connection with this appeal is denied.

The judgment entered December 31, 2018, on the jury verdict against Healy is affirmed. The corrected judgment entered January 10, 2019, in favor of Hammond assessing attorney's fees and costs against Gordon is vacated. The judgment entered March 19, 2019, taxing costs against Healy is vacated. The case is

⁶ The unpublished case relied upon by Healy to support his "null and void" argument is not binding precedent, and in any event, is distinguishable on the facts. See Troyanker v. Kamkina, 59 Mass. App. Ct. 1111 (2003).

remanded to the Superior Court for further proceedings
consistent with this memorandum and order.

So ordered.

By the Court (Meade,
Sullivan & Sacks, JJ.⁷),



Clerk

Entered: November 19, 2020.

⁷ The panelists are listed in order of seniority.