

payable to Schaffer's estate. Since Schaffer's will names Virginia Schaffer as the remainder beneficiary, the court held she was entitled to the retirement benefits.

Bud Schaffer appeals, contending the beneficiary named to receive benefits should the employee die before retirement, remained the beneficiary unless the designation was changed prior to retirement. He contends that writing N/A in the space reserved for beneficiary did not *change* the name of the beneficiary. We disagree.

[1-4] 1. While there is no case law on point, the Georgia Supreme Court has held that provisions of municipal retirement plans will be strictly construed and the rights of the parties will be determined under the law of contracts. See *Nash v. Tinch*, 235 Ga. 654, 655, 221 S.E.2d 425 (1975). Where the terms of a contract are susceptible of more than one meaning, the fundamental rule of contract construction is to give them the meaning which will best carry out the intent of the parties. *Brooke v. Phillips Petroleum Co.*, 113 Ga.App. 742, 744(2), 149 S.E.2d 511 (1966). In doing this we must look at the instrument as a whole and consider it in light of all the surrounding circumstances. *Brooke*, supra at 744, 149 S.E.2d 511. Thus, the favored construction will be that which gives meaning and effect to all the terms of the contract over that which nullifies and renders meaningless a part of the document. *Brooke*, supra at 744, 149 S.E.2d 511.

Accordingly, looking at the Application for Retirement, it is clear that in electing Plan A, it was Schaffer's intent to have the maximum payout of benefits during his lifetime, and, in accordance with the instructions on the form, his intent also was to not designate anyone as beneficiary. The trial court correctly found that this revised or superseded his designation of his brother to receive benefits prior to retirement. Further, as the parties do not dispute that in the event no beneficiary is named, the survivor's benefits are payable to Schaffer's estate, the trial court correctly held that the survivor's benefits became part of the estate.

[5-7] 2. Bud Schaffer also objects to the introduction into evidence of Howard Schaf-

fer's will, contending that it was irrelevant since the trial court could only find that the benefits were payable to the estate. We agree. But, this was a bench trial, and the error, if any, was harmless and could not affect the outcome. Indeed, when the judge sits as the trier of fact, it is presumed that she will consider only legally admissible evidence. *Daniels v. State*, 211 Ga.App. 23, 25, 438 S.E.2d 99 (1993).

Bud Schaffer also objects to language in the trial court's order which states the benefits are payable to Virginia Schaffer as remainder beneficiary under the will, instead of as executor of the estate. Since the trial court's order correctly finds the benefits became part of the estate, and since Virginia Schaffer stipulates she does not object to the funds being paid into the estate, we need not address this issue.

Judgment affirmed.

McMURRAY, P.J., and BLACKBURN, J., concur.



220 Ga.App. 398

PETERS

v.

HYATT LEGAL SERVICES.

No. A95A2867.

Court of Appeals of Georgia.

Feb. 28, 1996.

Certiorari Denied May 10, 1996.

Plaintiff sued law firm for legal malpractice, breach of contract, breach of fiduciary duty, and breach of statutory duty, alleging that firm represented both client and his wife in underlying divorce case without obtaining informed consent of both, and that firm's attorney presented forged documents with petition for divorce. Upon remand, 211 Ga.

App. 587, 440 S.E.2d 222, jury returned verdict awarding client nominal damages, attorney fees, and punitive damages. The Fulton Superior Court, Elizabeth Long, J., granted firm's motion for judgment notwithstanding verdict (JNOV) on punitive damages, and client appealed. The Court of Appeals, Pope, P.J., held that: (1) evidence supported award of punitive damages, and (2) trial court could not consider punitive damages award in determining client's entitlement to prejudgment interest.

Affirmed in part and reversed in part.

1. Appeal and Error ◊1195(1)

Upon remand, trial court was precluded from granting judgment notwithstanding verdict (JNOV) to law firm on punitive damages issue in legal malpractice action, as law of case arose from Court of Appeals' prior decision that question of fact remained concerning whether conduct of firm's lawyer (who allegedly undertook representation of plaintiff in divorce action, but who subsequently secretly undertook representation of plaintiff's wife, presenting forged documents with petition for divorce) raised presumption of conscious indifference to consequences; even though, upon remand, firm presented new witness who testified as to audit procedure firm utilized to discover internal problems, that witness did not directly supervise lawyer in question and was not her managing attorney. O.C.G.A. § 51-12-5.1(b).

2. Appeal and Error ◊934(1), 1024.4

In reviewing grant of judgment notwithstanding verdict (JNOV), Court of Appeals must construe evidence in light most favorable to party who obtained jury verdict; standard of review is whether there is any evidence to support jury's verdict.

3. Attorney and Client ◊129(2)

Evidence supported \$175,000 punitive damages award in legal malpractice action arising from defendant law firm's representation of plaintiff in underlying divorce action; evidence showed that firm represented both plaintiff and his wife in divorce action without obtaining informed consent of both, that firm's conduct was "unethical," "improper,"

and constituted breach of firm's agreement with plaintiff, that firm never sent plaintiff any paperwork or contacted him in any way, and that firm presented forged documents with petition for divorce. O.C.G.A. § 51-12-5.1(b).

4. Judgment ◊199(3.2, 3.11)

For trial court to correctly grant motion for judgment notwithstanding verdict (JNOV), there must be no conflict in evidence as to any material issue and evidence introduced, with all reasonable deductions therefrom demanding certain verdict.

5. Interest ◊39(2.55)

Trial court may not consider punitive damages in determining plaintiff's entitlement to prejudgment interest under statute providing for such interest if judgment is for amount not less than amount demanded. O.C.G.A. § 51-12-14(a).

Calabro & Jennette, Michael M. Calabro, Atlanta, for appellant.

Goodman, McGuffey, Aust & Lindsey, William S. Goodman, Judy F. Aust, Powell, Goldstein, Frazer & Murphy, Richard C. Mitchell, Kathlynn L. Butler, Atlanta, for appellees.

POPE, Presiding Judge.

This is the second appearance of this legal malpractice, breach of contract, breach of fiduciary duty, breach of statutory duty case before this court. See *Peters v. Hyatt Legal Svcs.*, 211 Ga.App. 587, 440 S.E.2d 222 (1993). After a bifurcated trial, the jury awarded plaintiff Richard Peters \$10,000 in nominal damages, \$35,545.10 in attorney fees and expenses of litigation, and \$175,000 in punitive damages against Hyatt Legal Services (Hyatt). The trial court granted Hyatt's motion for judgment notwithstanding the verdict on punitive damages, and Peters appeals.

Richard E. Peters brought suit against Hyatt, Hyatt attorney Linda Gross and Hyatt legal assistant and notary public Ka-

sonya M. Storey for damages resulting from Hyatt's representation of Peters in an uncontested divorce action. Although defendant Gross died after Peters filed the complaint, she was aware that legal action had been threatened.

Peters and his former wife were married on July 2, 1986 and had one child. Both were enlisted personnel in the United States Army with Mr. Peters stationed in West Germany. In January 1988, Peters discovered his wife in bed with another man. Peters and his wife took steps to separate legally that same month. Counsel for Mrs. Peters in West Germany prepared a proposed settlement agreement which Mrs. Peters executed on June 24, 1988. However, Peters did not agree to the proposed terms and did not sign the agreement.

On October 14, 1988, Peters returned to the United States on military leave to obtain a divorce. He consulted Hyatt attorney Linda Gross, paying \$222.50, half the total fee for an uncontested divorce. Peters signed a fee agreement with Hyatt and signed his name on the signature line titled "client."¹ Peters returned to duty in West Germany and expected the paperwork would be sent to him within 30 days, and that he would then receive a bill for the balance of the fee. He testified he told Gross if she provided him with 30 days' notice he expected that he could obtain the military leave necessary to be present in court. When Mrs. Peters asked him about the status of the pending divorce, Peters provided her with the name and address of Gross. Although Peters told his wife he would send the remaining money to Hyatt, Mrs. Peters indicated to him she would satisfy the balance while she was in the United States later in the month. Peters testified he did not authorize his wife to consult with Gross, but only to pay the balance so the divorce could proceed.

In December 1988, Mrs. Peters paid the outstanding balance and Gross began representing her. Although Peters thought that Hyatt continued to represent him, Gross had

1. The Hyatt Legal Services Fee Statement provided, "When half the total attorney fee and costs is paid, we will complete preparation of the paperwork. When your account is paid in full,

no contact with him after his initial visit. Instead, Gross filed the complaint for divorce with Mrs. Peters as plaintiff on December 29, 1988, the day after Mrs. Peters went to Hyatt and paid the remainder of the fee. It is undisputed that the acknowledgment of service of the complaint dated December 29, 1988, contains a forged signature of Richard E. Peters, notarized by Kasonya M. Storey, a Hyatt employee. Nor is it disputed that the consent to final hearing dated December 29, 1988, witnessed by Linda M. Gross, the Hyatt attorney, contains a forged signature of Richard E. Peters.

The forged acknowledgement and forged consent were filed with the petition for divorce on December 29, 1988. A final judgment and decree was thereafter entered on January 31, 1989. After Peters discovered the divorce was final, he contacted Hyatt to find out what had transpired and Hyatt informed him that the file had been lost. Peters then obtained the paperwork directly from the court, discovered the forged signatures, and realized something was wrong.

1. Peters first contends that the trial court erred in granting j.n.o.v. on the issue of punitive damages. We agree.

[1] (a) In *Peters v. Hyatt Legal Svcs.*, supra, we previously determined summary judgment was not appropriate on the issue of punitive damages because a question of fact remained concerning "whether Hyatt has injured Peters as a result of that 'entire want of care which would raise the presumption of conscious indifference to consequences.' OCGA § 51-12-5.1(b). See generally *Powell v. Ferreira*, 198 Ga.App. 465 (402 S.E.2d 85) (1991)." *Peters*, 211 Ga.App. at 593(3), 440 S.E.2d 222. Consequently, our previous decision was and is the law of this case. See *Starling, Inc. v. Housing Auth. of Atlanta*, 170 Ga.App. 858, 318 S.E.2d 728 (1984).

Hyatt contends this court's earlier ruling was not binding because the case was not in the same evidentiary and procedural posture. Hyatt presented a new witness, Scott Lang,

we will file the case. This is not binding until you make a payment. Your signature allows us to represent you after payment is made."

who testified as to the audit procedure Hyatt utilized to discover internal problems. However, Lang was hardly a pivotal witness. He testified he did not directly supervise Gross and was not her managing attorney. Moreover, Lang's testimony failed to show that the so-called audit process detected the conflict problem at issue here.

[2] (b) Even if we assume that the evidentiary and procedural posture had changed in a material way, in reviewing the grant of j.n.o.v. this court must construe the evidence in the light most favorable to the party who obtained the jury verdict. *Pendley v. Pendley*, 251 Ga. 30, 302 S.E.2d 554 (1983). The standard of review is whether there is any evidence to support the jury's verdict. *Lee v. Newman*, 240 Ga. 483, 241 S.E.2d 241 (1978).

[3] OCGA § 51-12-5.1(b) provides that "[p]unitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the 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." (Emphasis supplied.)

Peters presented the following evidence of Hyatt's entire want of care from which the jury could have determined the evidence raised the presumption of conscious indifference to consequences. It is undisputed that the forged documents were at all times in Hyatt's sole custody and control. It is undisputed that Hyatt represented adverse parties in a divorce proceeding without obtaining the informed consent of both. Peters presented evidence of a conflict of interest and breach of fiduciary duty. Mrs. Peters testified that the Army Legal Center refused to represent both her and her husband. Hyatt's own expert testified he would not allow an attorney in his office to represent both parties to a divorce. Peters' expert testified Gross' conduct was "unethical," "improper," "illegal," and constituted a breach of her agreement with Peters. Peters' expert also claimed Gross had a duty to inform Peters of his case. Yet Peters testified that after he paid half the fee, Hyatt never sent him any paperwork or contacted him in any way. Peters also testified that when he returned

stateside and contacted Hyatt he was told his file had been lost. Hyatt's employee, Storey, admitted she sometimes notarized documents without people signing in her presence, a violation of the statutory duty imposed by OCGA § 45-17-8(e). No evidence was presented that Hyatt's so-called audit procedure properly detected the conflict problem. For the foregoing reasons, we reject Hyatt's contention that there was insufficient factual evidence to support an award of punitive damages.

Hyatt argues that neither dual representation nor witnessing the forging of Peters' signature supports the imposition of punitive damages because punitive damages are not allowed for violation of an ethical rule. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374, 453 S.E.2d 719 (1995). However, Hyatt has distorted the holding of *Allen*. The Supreme Court held that *standing alone*, an alleged violation of the Code of Professional Responsibility or the Standards of Conduct cannot serve as a legal basis for a legal malpractice action. Moreover, evidence of even a potential conflict of interest is sufficient to raise a jury issue on punitive damages in a legal malpractice case. *Read v. Benedict*, 200 Ga.App. 4, 6(2), 406 S.E.2d 488 (1991).

[4] In order for a trial court to correctly grant a motion for j.n.o.v., there must be no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom demanding a certain verdict. *Hiers-Wright Assoc. v. Manufacturers Hanover Mtg. Corp.*, 182 Ga. App. 732(2), 356 S.E.2d 903 (1987). In this case, construing the evidence in a light most favorable to the party who secured the jury verdict, we do not find that the evidence demands a verdict in Hyatt's favor. *B & C Tire, etc. v. Cooper Tire, etc. Co.*, 212 Ga.App. 228, 231, 441 S.E.2d 468 (1994). Accordingly, the trial court's granting of j.n.o.v. on the issue of punitive damages must be reversed.

[5] 2. Peters also contends that the trial court erred by not considering punitive damages in determining his entitlement to pre-judgment interest pursuant to OCGA § 51-12-14. Peters argues that the exclusion of

said interest violates the plain statutory language and claims that the issue of prejudgment interest on punitive damages has not been judicially determined.

We disagree. In *General Motors Corp. v. Moseley*, 213 Ga.App. 875, 889, 447 S.E.2d 302 (1994), this court held, "The purpose of prejudgment interest is to compensate the injured party for the delay in receiving money damages. [Cits.] Punitive damages, however, are intended to punish, penalize, or deter a defendant, [cit.]. It follows that awarding prejudgment interest on punitive damages would not further the purpose of OCGA § 51-12-14(a)."

A plaintiff is only entitled to prejudgment interest under OCGA § 51-12-14(a) if the judgment for compensatory damages is for an amount not less than the amount demanded. In this case, in his statutory letter, Peters demanded \$85,000 and the jury awarded \$10,000 nominal damages and \$35,545.10 attorney fees and expenses of litigation. Peters was not entitled to prejudgment interest because the amount demanded exceeded the amount the jury awarded, exclusive of punitive damages. *Moseley*, 213 Ga. App. at 889, 447 S.E.2d 302. Accord *Martin v. Williams*, 215 Ga.App. 649, 651, 451 S.E.2d 822 (1994).

Judgment affirmed in part and reversed in part.

BEASLEY, C.J., and RUFFIN, J., concur.



220 Ga.App. 406
SHILLIDAY et al.

v.

DUNAWAY.

No. A95A2259.

Court of Appeals of Georgia.

Feb. 29, 1996.

Certiorari Denied May 10, 1996.

Pedestrian who was injured in collision with automobile brought negligence action

against automobile driver. The Superior Court, Clayton County, Deborah C. Benefield, J., entered judgment for driver. Pedestrian appealed. The Court of Appeals, Smith, J., held that: (1) late disclosure of photograph of accident scene did not warrant reversal; (2) automobile driver's testimony that photograph depicted skid marks left by her car on date of accident authenticated photograph so as to render photograph admissible; and (3) pedestrian was not entitled to submit jury charge regarding driving at speeds greater than reasonable under circumstances.

Affirmed.

1. Judgment ⇌373

Although photograph of scene of accident involving automobile and pedestrian was placed in police files under fictitious name at direction of police officer who was uncle of automobile driver who was defendant in negligence action that arose from accident, disclosure of photograph to pedestrian just before trial did not warrant setting aside judgment on basis of fraud; pedestrian failed to establish that driver had knowledge that photographs were taken or asked officer to take photographs, and counsel for pedestrian failed to exercise due diligence in obtaining photograph. O.C.G.A. § 9-11-60(d)(2).

2. New Trial ⇌102(1)

Party seeking new trial on ground of newly discovered evidence is required to show that failure to acquire evidence earlier was not caused by lack of due diligence.

3. Appeal and Error ⇌232(2)

Mere statement of objection to admission of photograph as evidence in negligence action without statement of grounds for objection did not preserve for appeal issue of whether photograph should not have been admitted on ground that it was not properly authenticated.

4. Evidence ⇌380

Authentication of photograph requires only showing that it fairly and truthfully represents what it purports to depict.