

PROFESSIONAL LIABILITY UPDATE

COMPARATIVE NEGLIGENCE

By Kate Kimberlin

Yale v. Browne 2017 WL 947608 (Cal. Ct. App. February 9, 2017, as modified March 10, 2017)

The Second District holds under certain circumstances it may be proper to apply the concept of “comparative fault” in legal malpractice actions. While precedent had previously recognized that the concept of “contributory” negligence may apply in legal malpractice cases, this is the first opinion to approve the use of a “comparative” negligence defense in a legal malpractice action.

Valerie Yale sued her attorney, Robert Browne, II, for legal malpractice in connection with his preparation of family trust documents. Yale alleged Browne failed to accomplish her explicit goal of keeping her assets separate from marital property owned with her former husband.

Yale testified she had lost half of everything in a previous divorce, and when she married again she insisted on a prenuptial agreement to preserve her separate property. Years later Yale engaged Browne to update her trust. Although Yale read a paragraph declaring the trust included both separate and community property, she did not raise any concerns with Browne.

When Yale began divorce proceedings to end her second marriage, she asked a new attorney to review the trust documents prepared by Browne. She learned all the assets in the trust were community, rather than separate, property. Yale moved the assets but this ultimately cost her several hundred thousand dollars.

Browne successfully argued Yale contributed to the legal error by failing to mention problems she had identified in the draft trust documents. The trial court gave a comparative fault jury instruction, which ultimately reduced Yale’s damages by ten percent.

On appeal Yale argued the instruction was improper because all she had done was rely on her lawyer’s advice, and it would be inequitable to apply comparative fault in the context of a lawyer-client relationship because the lawyer has more knowledge and experience than the client. The Court of Appeal disagreed, and held in some cases the concept is aptly applied.

The Court of Appeal explained the facts supported the challenged instruction because there was evidence of Yale’s own deficient conduct. She testified she had read the applicable provision, saw the change from separate property to community property, understood the issue, yet remained silent. Yale’s silence in the face of her admitted

www.longlevit.com

knowledge about the difference between community and separate property created a sufficient basis to offer the comparative fault instruction to the jury.

For these same reasons, the Court also disagreed with Yale's assertion a comparative fault analysis in a legal malpractice action violates public policy.

Comment: This case recognizes "comparative fault" may apply to reduce an attorney's damages to a client in a legal malpractice action. Defense counsel should be prepared to develop specific evidence of a client's comparative fault in order to justify the application of this doctrine at trial.