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Case Summaries

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ATTORNEY LIABILITY FOR MALICIOUS PROSECUTION.

Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980).

Vern Miller's client sued R.A. Nelson, M.D. for medical malpractice. After the trial court dismissed the action, Nelson sued Miller for malicious prosecution and negligence in Miller's failure to investigate the facts of the case independently of the client's statement of them. The Kansas Supreme Court affirmed the trial court's dismissal of the negligence claim, but it reinstated the malicious prosecution action. The court held that prior to bringing suit, an attorney must investigate the facts of a client's claim independently of the client's statement of them; otherwise, he may be subject to malicious prosecution liability if he files a groundless suit.

To find Miller could have been liable for malicious prosecution for suing Nelson without probable cause and with malice, the Kansas court first disregarded Miller's belief that he had probable cause to sue and inferred that the facts he should have known, *i.e.*, the ones that his independent investigation would have revealed, did not give him probable cause to believe his client's claim was actionable. Second, because investigation would have shown that the claim was not actionable and because bringing a groundless suit violates Disciplinary Rule 6-101 of the Code of Professional Responsibility, Miller could not have intended to secure proper adjudication of the claim by bringing suit; therefore, he could have filed the suit with malice, as defined in section 674 of the Restatement (Second) of Torts.

Miller is the first malicious prosecution action to base an inference of malice on ordinary negligence. The precedential value of this decision is uncertain, however, because *Miller* expressly overrules *Maechtlen v. Clapp*, 121 Kan. 777, 250 P. 303 (1926), which quoted extensively from *Peck v. Chouteau*, 91 Mo. 138, 3 S.W. 577 (1887). *Peck* is still strong authority in Missouri and other jurisdictions; it seems unlikely that Missouri will follow Kansas and overrule *Peck*. Nonetheless, the attorney should be aware of this potential source of liability, especially if any of his practice extends into Kansas.

The weakest part of the decision is the translation of Miller's negligence in investigating the facts into an intent in filing suit for reasons

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* EDITOR'S NOTE: This edition of the Missouri Law Review inaugurates a new section entitled "Case Summaries." Case Summaries provide a synopsis of important cases that do not appear as Casenotes because of space limitations and the ability to state the case's importance succinctly. The Missouri Law Review hopes that the additional cases this section brings to readers' attention will be helpful.

other than securing proper adjudication of the claim. Intentional conduct does not embrace merely negligent conduct. It is a contradiction in terms, therefore, to find a person "intentionally negligent"—to find that after negligently investigating his client's story and obtaining facts that Miller believed supported a cause of action, he then intended to file a baseless complaint.

In response to this decision, attorneys will face a difficult decision in marginal cases: not to sue, independently investigate, or risk liability by bringing suit without independent investigation.

KEVIN R. SWEENEY

"SINGLE PRODUCT" SECONDARY CONSUMER PICKETING. *NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607 (1980) (*Safeco*).

Local 1001 struck Safeco Title Insurance Company and extended their picketing to five local title companies. The picketers passed out handbills that asked customers to cancel their Safeco policies. Each title company derived approximately ninety percent of its gross income from selling Safeco insurance.

The NLRB found the title companies to be "neutrals" and the picketing to be an illegal secondary boycott. The United States Court of Appeals for the District of Columbia Circuit agreed that the title companies were neutrals. Nonetheless, the court of appeals held that the picketing was protected under the *Tree Fruits* doctrine, which was announced in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*). In *Tree Fruits*, the Supreme Court interpreted section 8(b)(4)(ii)(B) of the National Labor Relations Act to allow consumer picketing of a secondary employer under certain circumtances. Secondary consumer picketing was declared legal if targeted at the struck product and not at the secondary employer. In *Safeco*, the court of appeals found that the *Tree Fruits* rule protected the single product picketing, even though the economic impact on the secondary employer would be essentially the same as a boycott directed at the employer.

The Supreme Court rejected the court of appeals' position. The Court noted that unlike *Tree Fruits*, the *Safeco* picketed product represented almost all of the neutral's business. Because customers could not have heeded the boycott without withholding their patronage entirely, the picketing effected a total boycott of a neutral. The Court viewed this activity as a plain violation of section 8(b)(4)(ii)(B), which forbids coercion of neutrals to induce them to cease dealing with the struck employer.

The Court formulated a new test to determine whether secondary con-

sumer picketing targeted at the primary employer's product is coercive and therefore unlawful. Under the new test, picketing is unlawful if the targeted product is of such importance to the neutral that "ruin or substantial loss" reasonably would be expected. This rule will apply not only to single product picketing, but also when the struck product is a major product in a neutral's business. As a result, the ruin or substantial loss test sets the stage for increased emphasis on establishment of economic facts concerning the importance of a product to a neutral business.

CLYDE W. CURTIS