

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1983

September Term, 2014

RICARDO R. SILVA & ASSOCS.

v.

FLORENCE FOSTER

Woodward,
Friedman,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: November 12, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant Ricardo R. Silva & Associates (RRSA) sued appellee Florence Foster to collect a fee it claimed was owed. Foster filed a counterclaim for breach of contract and fraud.¹ She prevailed in her counterclaim and was awarded damages of \$35,400. Of that amount, \$400 was for breach of contract – RRSA’s failure to perform the Agreement that it and Foster had entered into -- and \$35,000 was for fraud on RRSA’s part, \$15,000 in compensatory damages and \$20,000 in punitive damages. RRSA claims in this appeal that there was insufficient evidence to support the award of compensatory damages and, in light of that, there was no basis for an award of punitive damages.

BACKGROUND

Foster had been an employee of the Division of Pretrial and Detention Services of the State Department of Public Safety and Correctional Services (DPSCS). In December 2010, she was served with a notice of termination based on three alleged incidents. Foster pursued her appellate rights and achieved some success. An administrative law judge reversed two of the three charges but upheld the sanction of dismissal with respect to the remaining one. In a judicial review action, however, the Circuit Court for Baltimore City, on January 3, 2012, held that the dismissal on that charge was arbitrary and capricious and remanded the case to the agency for reconsideration of the disciplinary sanction.

¹ The action was filed initially in the District Court but, upon a demand for jury trial by Foster, it was transferred to the Circuit Court for Baltimore City, where all further proceedings occurred.

In April 2012, Foster, with an attorney (Miliman), attended a mitigation conference.² When the Commissioner of the Division took no action following the conference, Foster, through Miliman, filed a petition to hold the Commissioner in contempt for failing to comply with the court's remand order. The petition sought not only an order of contempt against the Commissioner but also an order reinstating Foster with full back pay. That relief seemed to be based on Foster's reading of a provision in Md. Code, §11-106(b) of the State Personnel and Pensions Article, requiring that any discipline be imposed within 30 days after the appointing authority acquires knowledge of the misconduct. Foster averred that, for purposes of that statute, the Commissioner acquired notice of the misconduct on January 12, 2012, when the court remanded the case, that the 30-day deadline had passed, and that discipline was no longer permitted.

The petition was rejected a month later because it did not contain a certificate of service. Foster asked Miliman to refile the petition, in order to coerce the Commissioner to act, but Miliman refused to do so. In May 2012, the agency offered to settle the matter for \$17,000, which was equivalent to three months back pay, but with no reinstatement. That offer was rejected.

In June 2012, Foster, by coincidence, saw a friend, Robert Larhue, who she knew to be a former correctional officer, and told him about her employment situation. She said, though Larhue later denied it, that she told Larhue in particular of her need to have someone

² Foster was represented by Howard and Mandy Miliman. We shall refer to them collectively as Miliman.

file a contempt petition for her by July 1, 2012.³ According to Foster, Larhue informed her that he worked with an entity known as the Maryland Association of Correctional & Security Employees (MACSE) that had an affiliation with RRSA, that he handled disciplinary appeals for correctional employees, that RRSA could handle the contempt matter for her, and that Darren Margolis, an attorney who worked with RRSA, would be the one who would file the petition.⁴

On June 22, 2012, following that meeting, Foster entered into an Agreement with RRSA. Larhue signed the Agreement for RRSA on the porch of Foster's home. Silva – the principal of RRSA -- is not an attorney; the entity is characterized in the Agreement as a “consulting firm.” Under the agreement, for an “appearance” fee of \$400, RRSA agreed to “assist [Foster] administratively with her appeal against [the Division of Pretrial and Detention Services]” and further to “assist and counsel her in any future judicial proceedings in the aggressive pursuit of [her] appeals.”

The Agreement further provided that, if the dispute was successfully resolved administratively or in court proceedings and if Foster agreed to use a law firm “associated with” RRSA, she would authorize payment to RRSA of 25 percent of the final gross back pay awarded or 13.5 percent of the back pay if no evidentiary hearing took place. Foster

³ Foster believed that the contempt petition had to be filed by July 1, but nowhere in the record extract filed in this appeal did she explain why she thought there was any such deadline.

⁴ Mr. Silva testified that Larhue was employed by RRSA and MACSE.

also agreed to remain a dues-paying member of MACSE for at least twelve months or pay a year's dues immediately upon receiving a final award.

According to Foster, she informed Larhue that she wanted the contempt petition to be filed by July 1, 2012. On June 28, 2012, Silva, on behalf of RRSA, sent a letter to Glendell Adamson, the Director of Human Resources for DPSCS advising that MACSE had been retained to represent Foster. Two days earlier, on June 26, concerned about what she regarded as a July 1 deadline for filing the contempt petition and having heard nothing from either Larhue or Silva, Foster filed the petition herself, *pro se*, using the copy of the petition that Miliman had filed earlier but adding a certificate of service. No one on behalf of RRSA or MACSE ever filed a contempt petition or entered an appearance in the contempt proceeding.

Notwithstanding Foster's Agreement with RRSA, Miliman remained active in trying to negotiate a settlement. On July 5, 2012, he forwarded to Foster an offer from DPSCS to resolve the disciplinary proceeding, which she rejected. Foster testified that, on August 9, she received a letter from DPSCS informing her that a "mitigation conference" had been scheduled for August 14.

Professing a belief that the conference concerned the contempt petition she had filed, Foster claimed that she immediately notified Larhue, who said he would go with her to the conference. Larhue failed to show up, however, and, after a wait of 25 minutes, the conference proceeded without him (or Silva or Margolis). According to Ms. Adamson (the DPSCS human resources director) what was scheduled for August 14 was not a mitigation

conference but a meeting for the sole purpose of the Commissioner informing Foster of the decisions he had made, and that, in fact, is what occurred. Ms. Adamson testified that a representative would have had no right to attend that session or make any argument in Foster's behalf.

There was no negotiation at that session and there was no mention of a contempt petition, which Foster agreed was mooted by the Commissioner's action. Instead, the Commissioner merely informed Foster of his decisions (1) to reinstate her as an employee, (2) to reassign her to a different institution, (3) to suspend her for six months without pay for the period from December 28, 2010 to June 28, 2011, and (4) to award her back pay for the period June 28, 2011 through August 21, 2012.⁵ Foster eventually received a check for \$80,366. Upon learning of this, Mr. Margolis, on behalf of RRSA, demanded that Foster immediately tender to RRSA \$10,905, representing 13.5 percent of \$77,899 in back pay and \$389 for MACSE dues.

Upon Foster's refusal to accede to that demand, RRSA filed this lawsuit, seeking recovery of the \$10,905 which, as noted, prompted the counterclaim by Foster. On RRSA's claim, the jury found that Foster did not breach the Agreement with RRSA and therefore awarded no damages. With respect to Foster's claim for breach of contract, the jury found that RRSA did breach that Agreement and awarded damages of \$400 – the fee Foster had paid for services never rendered. The jury answered "yes" to the question of

⁵ The actual order implementing those decisions is dated August 28, 2012.

whether RRSA had made a fraudulent misrepresentation to Foster and awarded \$15,000 in compensatory damages and \$20,000 in punitive damages on that claim.

DISCUSSION

This appeal concerns only the judgment entered on Foster’s fraud claim. RRSA has made no complaint about the rejection of its claim for \$10,905 or the award to Foster of \$400 on her breach of contract claim. The dispute over the damages awarded on the fraud claim hinges largely on what the Agreement obligated RRSA to do – what RRSA promised to do – and, as to that, the parties had very different views.

Foster maintained that what she was looking for was an attorney to file a new petition for contempt. She already had Miliman helping her in the administrative proceeding, trying to negotiate with Ms. Adamson. Although the term was not used, it appears that what she was looking for, according to her, was somewhat in the nature of a “limited representation” by an attorney, simply to file a contempt petition and represent her in the contempt proceeding. *See* Rule 1.2 of the Maryland Rules of Professional Conduct, Comment 6 in effect during 2012 (prior to 2015 amendments).

The Circuit Court already had ruled that discharge was not a proper sanction, which she seemed to believe meant that she would have to be reinstated. The only question really was how much back pay she would be entitled to – whether the Commissioner could order a suspension without pay for a period of time, which would diminish any award of back pay. Having been out of work since December 2010 and six months having elapsed since

the remand order, Foster needed the Commissioner to make a decision, and she believed that a contempt action would force him to do so.⁶

RRSA obviously had a different view of its role. Silva stated that, when Foster first came to see him, she told him that she had been fired, that she had an attorney who had represented her, that the Circuit Court had remanded the case, and that DPSCA had offered only three months back pay with no reinstatement, and she asked whether he (Silva) could do better. Silva said that he could and that he would prepare a personal service agreement for her, which she signed a week or two later. Silva added that there was no mention in his conversations with Foster of a contempt petition, which came up only later, after the Agreement was signed. He was very clear that Foster did not come to him for the purpose of filing a contempt petition. Mr. Larhue supported Silva's testimony. He said that Foster never mentioned the filing of a contempt petition during his conversation with her but asked only what his agency could do to help her get her job back with full back pay.

⁶ It is difficult to determine, from the sparse record extract before us, precisely what Foster's position was regarding the Commissioner's options. There is some indication that she had been dismissed because the Commissioner concluded that at least one of the charges fell within the ambit of Md. Code, §11-106 of the State Personnel and Pensions Article, which provides for *automatic* termination of employment for conduct listed in that section and that the court found that the one remaining charge was not covered by that section. If that was the basis of the court's decision, it is not clear whether the Commissioner nonetheless was entitled to order dismissal as a *discretionary* penalty. From the offers that were made during negotiations following the remand, it appears that he believed that he did have that authority. At oral argument before us, Foster stressed that, because the deadline for imposing *any* discipline had elapsed, no discipline of any kind was permissible. All that Foster needed was a decision that she could either acquiesce in or challenge. We shall assume that that is what drove her desire for a new contempt petition. Whether RRSA undertook to help her in that regard is the crux of this case.

As worded, the Agreement, which Silva said was a standard Agreement that RRSA used for all of its clients, though not well-drafted, clearly anticipated something other than filing a contempt petition. The word “contempt” does not appear in the Agreement. It states as its purpose “a relationship to promote the efficient processing of administrative and/or judicial appeals relating to [Foster’s] employment rights.” Paragraph I obligated RRSA to assist Foster “administratively with her appeal against DPDS” and to “assist and counsel her in any future judicial proceedings in the aggressive pursuit of [her] appeals.” The fee for that was \$400. If Foster used a law firm associated with RRSA and her appeal was resolved successfully at the administrative level without an evidentiary hearing, she agreed to pay RRSA 13.5 percent of the recovery.

Whatever might have been Foster’s intent or expectation, the Agreement she signed cannot reasonably be read as being limited to representation in a Circuit Court contempt proceeding, which RRSA, on its own, was not competent to do because no member of that firm was an attorney.

Apart from the different expectations of the parties, two other aspects are relevant – what RRSA actually did pursuant to the Agreement and how this dispute played out in the Circuit Court. It is clear that neither RRSA nor anyone affiliated with it ever filed a contempt petition, although Foster made that somewhat moot when, on June 26, 2012 – just four days after the Agreement with RRSA was signed -- she filed such a petition herself. The evidence showed that RRSA sent a representation letter to Adamson and that Silva had at least one conversation with Adamson in which he demanded full back pay for

Foster. Silva claimed that he had several conversations with her, but Adamson could remember only one.

There was a clear conflict in the testimony of the witnesses regarding what RRSA was expected to do. Foster's claim of fraud – Counts III and IV of her counter-complaint – was based on averments that RRSA (Silva) represented that it would represent Foster in the Circuit Court for Baltimore City, that Silva was not a licensed attorney and could not lawfully represent her in a judicial proceeding, that he made that representation with knowledge that it was false, that Foster acted in justified reliance on the representation and paid him a \$400 appearance fee, and that Silva never entered an appearance in either the Circuit Court or before the Office of Administrative Hearings.

In her complaint, Foster alleged \$16,000 in compensatory damages and \$100,000 in punitive damages. As best we can tell, the compensatory damage claim was based on the averment that, had RRSA or its attorney filed a contempt petition, the Commissioner would not have ordered a six-month suspension without pay (or if he did, it would have been overturned on appeal) and Foster would have received an additional \$16,000 in back pay. Boiling all of this down to its essentials, what was before the court, for presentation to the jury, was the claim by Foster that, had RRSA not made a false representation that it could and would file and pursue a petition for contempt, such a petition would somehow have been filed prior to July 1, 2012, that, had such a petition been filed, she would have received \$16,000 in additional back pay. That was the sole basis for the fraud claim, as pled.

As noted, RRSA complains that there was legally insufficient evidence to establish that claim, that the evidence did not support the assertion that the Agreement called for RRSA to file or pursue a contempt petition, that it all became moot in any event when Foster filed her contempt petition on June 26, 2012, and that there was no evidence that the Commissioner would not have suspended her for six months without pay if RRSA or its attorney had filed the petition. On this record, there would appear to be considerable merit to that argument. Unfortunately for RRSA, however, no motion for judgment, pursuant to Rule 2-519 was made at the end of the case; nor was any objection made to the court's instructions on the fraud claim, including the instructions on both compensatory and punitive damages. The issue of whether there was sufficient evidence to support the fraud claim or damages arising from it was thus waived.

Following rendition of the jury's verdict, RRSA filed a motion for remittitur or new trial, raising the sufficiency issue it has presented in this appeal, and the trial court held a hearing on that motion on September 19 and October 20, 2014. On October 20, it entered an order denying the motion "for reasons stated in open court." We can only guess at those reasons, because no transcript of either hearing, nor any stipulation in lieu of a transcript, has been supplied. It is clear, however, that a claim of insufficient evidence is not preserved if raised for the first time in a motion for new trial. *Bradley v. Bradley*, 208 Md. App. 249, 263 (2012). We find, with some regret, that the issue of sufficiency was not preserved for

appellate review. As there is nothing in the record to indicate why the trial court denied the motion for remittitur, there is no basis for us to conclude that it abused its discretion.

**JUDGMENT AFFIRMED; APPELLANT
TO PAY THE COSTS**