IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
JUN 8 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-1333

CHRISTOPHER J. WALLACE and THE WALLACE FIRM, PLLC

Plaintiffs-Below, Petitioners

v.

RAYMOND A. HINERMAN and HINERMAN & ASSOCIATES, PLLC

Defendants-Below, Respondents

Honorable David W. Hummel, Jr.
Sitting by Special Assignment
Hancock County Circuit Court
Civil Action No. 13-C-56

REPLY BRIEF OF THE PETITIONERS

Counsel for Petitioners:

Christopher J. Wallace, Esq.
WV State Bar No. 7807
The Wallace Firm, PLLC
P.O. Box 2100
Weirton, WV 26062
Telephone (855)530-9300
Facsimile (888)502-8391
cwallace@wallace-firm.com
Pro Se and on behalf of
The Wallace Firm, PLLC

Counsel for Respondents:

Raymond A. Hinerman, Esq.
WV State Bar No. 1737
Hinerman & Associates, PLLC
P.O. Box 2465
Weirton, WV 26062
Telephone (304)723-7201
Facsimile (304)723-7203
rah@hinermanlaw.com
Pro Se and on behalf of
Hinerman & Associates, PLLC

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. REPLY TO ARGUMENTS INISSUES RAISED ON APPEAL.....2

A. Good Cause.....2

B. The lower court and Respondents' interpretation of Respondents' undefined contract term violates West Virginia law and public policy.....3

C. Burden of Proof.....4

III. REPLY TO OTHER ISSUES RAISED THAT ARE OUTSIDE THE SCOPE OF THE APPEAL.....5

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

Clayton v. Martin,
108 W.Va. 571, 151 S.E. 855 (1930).....3

Kopelman and Assoc., L.C. v Collins,
196 W.Va. 489, 473 S.E.2d 910 (1996).....*passim*

I. Introduction

Petitioners raise three issues in this appeal:

1. The lower court erred when it ignored Respondents' admission in their Answer (and elsewhere) that the "good cause" element of the Hinerman contract had been met.

2. The lower court's apparent interpretation of the contract term "good cause" to mean that a client can't follow their current lawyer to a new law firm without paying double fees violates West Virginia law.

3. The burden to establish a lack of good cause lies with the drafter of the contract and party attempting to enforce the contract - not the client (when Respondents sue their former clients in a contract action) or the client's new lawyer (in the instant Kopelman action).

Respondents appear to respond to these issues by arguing that:

1. Petitioners' current use of a contract with similar language operates as estoppel (an argument never raised before the trial court)

2. Respondents' admission that "the good cause" element was met is "harmless error" because Respondents would have prevailed in the lower court anyway (had the lower court actually ruled on any of the substantive issues before it).

Petitioners will first address Respondents' Responses to the issues actually raised in the appeal. In order to support their harmless error argument, Respondents unfortunately spend the bulk of their brief arguing disputed issues of fact and law that were never ruled upon by the lower court, are unrelated to the actual ruling and were not raised in this appeal. This Court is not charged with sitting as trier of fact for the entire case. Petitioners will succinctly reply to the most inflammatory of these disputed facts in order to avoid going down the rabbit hole any further.

II. Reply to Arguments in Response to Issues Raised on Appeal

A. Good Cause

Surprisingly, Respondents state that "Petitioner makes no specific argument" regarding the first assignment of error – that the lower court ignored good cause evidence, particularly in the form of admissions by Respondents. Petitioners spend several pages in their initial brief articulating specific examples of the many ways in which Respondents, through both word and action, admitted that good cause was not an issue in this case and thus the contract term was met. Instead of responding to those examples of good cause evidence, Respondents argue (for the first time in this litigation) that Petitioners are estopped from challenging the lawfulness of the lower court's Order because Petitioners use similar "good cause" language in their own fee agreement.

Respondents' estoppel argument entirely misses the point. There is nothing unlawful about including a requirement in a representation contract that a client must have "good cause" to terminate. What *is* unlawful is asserting that a client's desire to follow their lawyer to a new law firm isn't good cause. Petitioners readily admit that they use a contract with similar language. But Petitioners would never assert that a client's decision to stick with a lawyer who moves to a new firm isn't good cause to terminate their law firm's contract. This is particularly true where the departing lawyer is the only individual that ever communicated with the client or did any work on his or her case. It's not the term "good cause" that's the issue, its Respondents' self-serving, after-the-fact *interpretation* of what good cause means that makes the term unlawful in this case.

B. The lower court and Respondents' interpretation of Respondents' undefined contract term violates West Virginia law and public policy.

Respondents fail to address any of the legal arguments set forth by Petitioners in this appeal regarding the unlawful effect of his interpretation of the good cause provision. Respondents' narrative on page 13 of their brief simply ignores the following West Virginia law:

"Where an attorney has been discharged, without fault on his part, from further services in a suit just begun by him under a contract for payment contingent upon successful prosecution of the suit, ***his measure of damages is not the contingent fee agreed upon, but the value of his services rendered****; and in the absence of evidence of the reasonable value of such services, no recovery can be had."* (emphasis added) *Kopelman and Assoc., L.C. v Collins,* 196 W.Va. 489,497, 473 S.E.2d 910, 918 (1996) *citing, Clayton v. Martin, 108 W.Va. 571, 151 S.E.* 855(1930).

The lower court states in its final Order that a discharged attorney can recover on his contingent fee agreement <u>or</u> in quantum meruit. As is set forth in detail in Petitioners' initial brief, this is not correct statement of law if the contingent fee agreement terms force the client to pay double fees in order to do nothing more than stay with an attorney that departs the original law firm. Respondents fail to address these legal issues at all, referring to them as a red herring. They instead argue estoppel and inject disputed facts that are denied by Petitioners, unrelated to the issues on appeal and never ruled upon by the lower court.

Importantly, the lower court's Order states that Respondents can "legally enforce" their contract against their former clients. Respondents now contend that a client's decision to stick with his or her lawyer when he moves to a new law firm is not "good cause." The lower court also makes its position clear (erroneously) that this is NOT a <u>Kopelman</u> case. If true, then this dispute is not between Petitioners and Respondents, but between Respondents and their former clients. Petitioners were not a party to those contracts and the disputed fees at issue in this

litigation were properly paid to Petitioners under a separate contract. The lower court's Order has no effect on those clients because they are not a party to the instant litigation.

When Respondents sue their former clients in order to enforce their contingent fee agreement (the only relief granted by the lower court), those clients will point to the evidence in the current record. That evidence indicates they terminated the Respondents' contract in order to remain represented by the only attorney that had ever done work on their cases. A finding that this reason for terminating the Respondents' contract is not "good cause" would violate West Virginia law for all the reasons set forth in Petitioners' initial brief. This type of litigation, between discharged attorney and former client, is precisely what this Court sought to avoid when it established the framework set forth in Kopelman.

C. Burden of Proof

In a similar vein, Respondents deny on page 13 that they have the burden of proof to establish a breach of their own contract, citing the lower court's (erroneous) holding that no evidence of good cause was presented in the current litigation. However, the court certainly did not rule that it was Petitioners' burden to establish that evidence.[1] The court ruled that Respondents could legally enforce their contract against their former clients. Since their former clients were not a party to this litigation, they will need to take action against them individually. Respondents forget that the *current* litigation was brought as a Kopelman action. If this Court finds that the appropriate litigation is a contract action instead, permitting Respondents to sue their former clients for fees, then certainly Petitioners have no burden, as Petitioners are not a party to that contract and won't be parties to that future contract action. And if Respondents

[1] Petitioners urged the lower court to address the issue of burden of proof when they argued their motion to alter or amend judgment, but the Court's single page opinion failed to do so.

attempt to enjoin Petitioners as parties in that lawsuit, guess where we end up? Right back at Kopelman.

Perhaps the most disingenuous statement in Respondents' brief is that Petitioners are seeking "unjust enrichment." It is *Respondents* that seek to be paid for thousands of hours of work done by *Petitioners* after Petitioners resigned from Respondent's firm. It's hard to imagine a more unjust basis for enrichment than what Respondents seek.

III. Reply to Other Issues Raised that are Outside the Scope of the Appeal

Throughout this litigation, the centerpiece of Respondents' argument is that Petitioners were somehow "bad actors" in leaving Respondents' law firm and therefore Petitioners should give Respondents all fees Petitioners have earned for their work on the former client cases since resigning two and a half years ago (and into the future). These issues have been exhaustively briefed in the lower court as part of the Kopelman action and Petitioners continues to deny both the factual and legal validity of Respondents' arguments. For example:

In their Response, Respondents suggest that Petitioners improperly removed the files belonging to the transferring clients from Respondents' office. Respondents fail to add that they maintained an electronic copy of the file documents created by Petitioners on the firm's computer system. Petitioners took their own working files so they could continue to meet deadlines and perform required work for the clients until they executed a new contract with the newly formed law firm. These clients and their cases were entirely unknown to Respondents or anyone else at his law firm. To leave the files behind would have jeopardized the rights of the clients and put those clients' cases in peril.

Respondents accuse Petitioners of using a "false address" on their Wallace Firm contracts. As the evidence presented in the lower court confirms, this is untrue. Petitioners had

the permission of the Taylor, Dittmar & Macricostas Law Firm to use their offices to meet clients and receive mail until he was able to rent their own office space. In fact, Petitioners did both. Further, no evidence was presented below that this had any impact on a single client's decision to retain Petitioners.

Petitioners also did not engage in "surreptitious activities" in contacting their existing clients prior to departure. In fact, Petitioners used a template letter approved by the American Bar Association to notify his clients of their option to remain with Respondents or to continue to be represented by Wallace after he resigned from the firm. 52 of the 53 clients chose to remain with Petitioners.

Respondents continue to disingenuously argue that they previously raised a contract defense specifically regarding the "good cause" provision of their contract but are unable to cite anything in the record to support that position or demonstrate that this very specific issue ever even occurred to them prior to the lower court's order. Instead, Respondents cite to some boilerplate contract defenses and state that they asserted "Wallace deserves no fees due to his mishandling of Workers' Compensation cases." Respondents have never asserted that the cases were mishandled as a basis for denying Petitioner's entitlement to *any* fees. While Respondents' expert testified that there were portions of the various files that she might have handled differently, she also testified that Petitioners should be paid for the work they did on the files after the resignation (which is in direct contradiction to Respondents' assertion that they have always argued Petitioners are entitled to NO fees). Respondents' expert made no reference whatsoever to the good cause provision of the contract. Respondents' near total basis for their case is that Petitioners didn't consult Respondents before resigning from Hinerman & Associates to begin their own practice and as such are "bad actors".

Respondents repeatedly state to this Court that they have argued all along that Petitioners are not entitled to any fees and have never taken a contrary position. Petitioners' initial brief pointed out numerous circumstances where Respondents, or their experts, stated the exact opposite (Petitioners' Brief pp 10-12). Respondents have no response or explanation to these direct contradictions to their most recent position.

Respondents argue that they are entitled to all future fees because of a "charging lien" in the Hinerman & Associates contract. The purpose of this provision is to permit the client's existing law firm to receive benefit checks directly and forward the proceeds to the client after the firm's fee is deducted. This is a convenience item for the law firm and a common practice. However, the contract language cited refers to "my attorney." Once the Hinerman contract was terminated and Hinerman & Associates is no longer the client's attorney, this authorization provision terminated with it. There is no survival clause in the contract to preserve this term, nor would there be any reasonable basis for one. Hinerman & Associates was no longer "my attorney" for these clients. What Respondents' are really attempting to argue here is that they are entitled to continue receiving *client* benefit checks in perpetuity, even after they no longer represent the client. That is nonsensical.

Respondents argue that the lower court's decision is harmless error because Petitioners lack standing in the instant case. This is another issue never raised until after the Court's March 1, 2014 Order. The case is about disputed attorney's fees, to be analyzed according to the framework set forth by this Court in Kopelman. Obviously, the Petitioners have standing as they are requesting a declaratory judgment regarding disputed fees that they have earned over the past two years and are held by them. The lower court's ruling has only confused the issue by ordering that Respondents have the right to enforce their contract against former clients – not

Petitioners. Unless this Court addresses this issue, the only resolution Respondents have available is to sue former clients for an additional fee. And this is precisely the type of activity that this Court has sought to avoid as a matter of public policy.

Respondents argue that his failure to deny (and as a result admit) Petitioners' averment that the good cause provision had been met is "excusable neglect or a mistake." They state that this position was very clear because "there are repeated statements and denials that Petitioner was entitled to any fees." While it may be true that Respondents at some times denied that Petitioners were entitled to any fees, those denials were never based on the "good cause" provision in the contract. Interestingly, Respondents argue that Petitioner also never raised this issue throughout the litigation. Of course Petitioners didn't raise the issue – "good cause" was already admitted in the Answer and was never raised by either party below. And as the lower court's Order stated, the parties had mutually agreed that this was a Kopelman case on the *distribution* of fees, not a contract dispute between former clients and their discharged attorney based on a good cause. It was a non-issue, never on anyone's radar until the lower court's Order of March 1, 2014. Respondents' pointing out that Petitioners never raised "good cause" subsequent to the Answer simply underscores Petitioners' point that the lower court erred - good cause was already admitted by Respondents.

Respondents assert that Petitioner "helped draft the [Hinerman] contract" and refers to a self-serving affidavit filed in the lower court proceedings. As Petitioner asserted in the lower court, this is false. Petitioner, an at-will employee of the Hinerman firm, had nothing to do with the drafting of the Hinerman contract.

Respondents also repeatedly state that Petitioners seek to be paid fees for work that was done while still employed by the Respondent law firm. This is patently false. Throughout the

proceedings below, Petitioners have only sought to be compensated for work done *after* their departure from Respondents. There is not a single page of the record below which suggests otherwise.

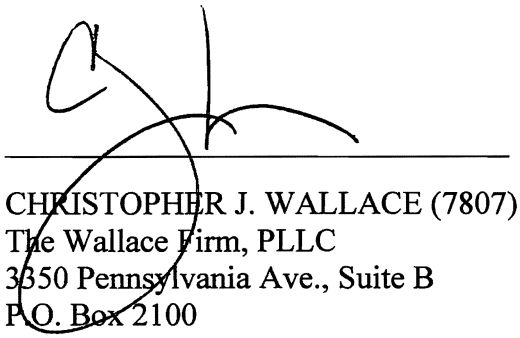
IV. Conclusion

Until the lower court's March 1, 2014 Order was issued, Respondents never asserted a contract defense related to the good cause provision in their contract. They have asserted a multitude of other, evolving arguments as to why they should get paid for all of Petitioner's work for the last 2.5 years and into the future – all of which are appropriately addressed by this Court's framework for attorney fee disputes in Kopelman. If the lower court's Order permitting Respondents to sue their former clients for breach of contract stands, it can only serve to spawn 52 additional lawsuits based on a premise that violates West Virginia law and public policy – that a client cannot terminate a fee agreement in order to remain with his existing attorney who departs for another law firm without paying double fees. This Court cannot "award Respondent attorney fees due on the contracts" as he requests, as the other party to those contracts is not a party to this litigation. Respondent's request for attorney fees and costs in this instant litigation is a snapshot of why we are here today. Instead of accepting a fair quantum meruit "as much as is deserved" distribution on fees earned on former client cases, Respondents are spending years of resources to ensure that Petitioners are punished for leaving Respondents' law firm and that Respondents' former clients will have to endure future litigation in order to keep the full workers compensation benefits that they have already received.

On Page 11 of his brief, Respondents state "why was the suit not brought on behalf of the affected clients? The answer is obvious this case is not about the clients it is all about attorney fees." Respondents are absolutely correct. This is a Kopelman case, not a contract case. The

lower Court's ruling unfortunately distorts a simple fee dispute into a contract quagmire. The clients have no suit to bring as they are fully satisfied with the services they received and the fees they paid for those services. It is this Court that should be concerned about the effect the lower court's Order will have on those clients when they are sued directly instead of having this issue resolved in the manner specifically designed for attorney fee disputes. The lower court lost its way from what both sides agreed was a Kopelman case, and ended up issuing an Order permitting Respondents to enforce their contract against non-parties to this action.

Respectfully submitted,

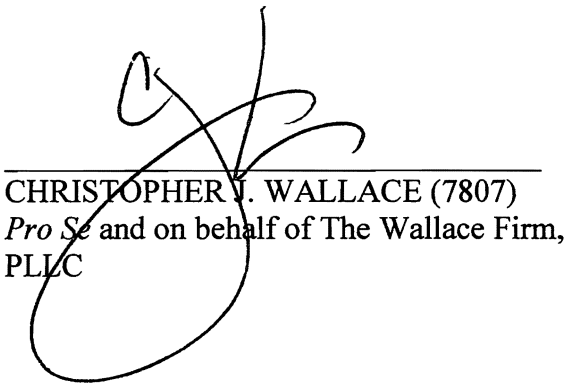


CHRISTOPHER J. WALLACE (7807)
The Wallace Firm, PLLC
3350 Pennsylvania Ave., Suite B
P.O. Box 2100
Weirton, WV 26062
Ph.: (855)530-9300
Fx.: (888)502-8391
cwallace@wallace-firm.com
Pro Se and for Petitioner The Wallace Firm, PLLC

CERTIFICATE OF SERVICE

Service of the *REPLY BRIEF OF THE PETITIONER* was had this 5th day of June, 2015, by regular U.S. Mail to the following:

Raymond A. Hinerman, Esq.
Hinerman & Associates, PLLC
3203 Pennsylvania Ave.
P.O. Box 2465
Weirton, WV 26062



CHRISTOPHER J. WALLACE (7807)
Pro Se and on behalf of The Wallace Firm, PLLC