No. 30248 - State of West Virginia ex rel. The Ogden Newspapers, Inc., a West Virginia corporation, dba The Journal Publishing Company, a West Virginia corporation v. Honorable Christopher C. Wilkes, Judge of the Circuit Court of Berkeley County, and Richard W. Shaffer

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Davis, Chief Justice, concurring, in part, and dissenting, in part:

Before the ink had barely dried on our earlier pronouncement that attorneys Robert J. Schiavoni and David M. Hammer could not represent a client, who formerly had been employed by Ogden Newspapers, Inc. (hereinafter referred to as "Ogden"), in an employment discrimination claim against Ogden,[1] this Court has taken up its blotter, smeared the law, and hastily rewritten this page in West Virginia's jurisprudential history. In the case *sub judice*, Ogden has asked this Court to find, once again, that Mr. Schiavoni and Mr. Hammer are disqualified from representing a former Ogden employee in an employment discrimination lawsuit. We previously concluded, in *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 482 S.E.2d 204 (1996) (per curiam) (hereinafter referred to as "*Ogden I*"), that such representation was strictly prohibited as violative of Ogden's confidences it had shared with its former counsel. Although the issue is the same in the instant appeal, the majority of this Court has nevertheless effectively erased its prior decision, and scribbled a new chapter

[1]*See State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 482 S.E.2d 204 (1996) (per curiam) (hereinafter referred to as "*Ogden I*").

in the law governing the disqualification of an attorney: potential conflicts relating to representation of a former client may be cured by the passage of time. I agree with the Court's conclusion that attorney Walt Auvil should be permitted to continue his representation of Mr. Shaffer and, therefore, concur in that portion of the majority's Opinion.[2] However, I cannot condone the Court's ultimate decision to allow Mr. Schiavoni and Mr. Hammer to continue in such representation, particularly when there have been no substantial changes in the governing law to support such a dramatic departure from our opposite conclusion in *Ogden I*. From this ruling of the Court, then, I dissent.

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[2]Because the majority opinion has failed to provide any separate discussion as to why Mr. Auvil should not be disqualified, I will set forth my reasons for such a conclusion. Ogden has contended that, because Mr. Auvil is associated as co-counsel with Mr. Schiavoni and Mr. Hammer, he should be disqualified. As support for its position, Ogden cited to the decision in *Ackerman v. National Property Analysts, Inc*., 887 F. Supp. 510 (S.D.N.Y. 1993). *Ackerman* involved attorneys who filed a complaint against two defendants based upon information provided by former counsel for both defendants. The court in *Ackerman* found that the attorneys for the plaintiffs were disqualified from the case as a result of the information they obtained from the defendants' former attorney.

In the instant case, Mr. Schiavoni and Mr. Hammer argued that the Court should not disqualify Mr. Auvil. To support their argument, Mr. Schiavoni and Mr. Hammer submitted an affidavit on behalf of Mr. Auvil. The affidavit states that Mr. Auvil never discussed the facts of Mr. Shaffer's case with Mr. Schiavoni and Mr. Hammer nor with anyone else in their law firm. Moreover, the affidavit also indicates that Mr. Auvil never met, spoke to or corresponded with Mr. Shaffer. It is further represented in the affidavit that Mr. Auvil only saw a draft copy of the complaint and has never discussed anything with Mr. Schiavoni and Mr. Hammer regarding their prior representation of Ogden.

Based upon the representations contained in the aforementioned affidavit, I believe the record supports the contention by Mr. Schiavoni and Mr. Hammer that Mr. Auvil has been shielded from any knowledge of Ogden that they obtained during their prior representation thereof. Consequently, I find no basis for the disqualification of Mr. Auvil.

A. The Majority Opinion Utterly Fails to Address the Evidence

The most distressing aspect of the majority opinion is the utter absence of any analysis of the actual evidence in this case. Instead of a factual analysis, the majority opinion sets forth two dispositive conclusions, both of which were unequivocally contradicted by the record. The majority opinion erroneously asserts: "It is clear that neither Hammer nor Schiavoni represented Ogden during the course of their representation in any employment discrimination litigation." This assertion plainly was made without any examination of Ogden's evidence. In fact, the evidence submitted by Ogden easily refutes the majority's conclusory statement.

Additionally, the majority opinion concluded that there had been "extensive changes in the law over the nine-year period" since Mr. Schiavoni and Mr. Hammer represented Ogden. Yet, the majority opinion fails to present any facts or discussion regarding the extensive "changes" in the law. Unfortunately, when reading the majority opinion, one cannot determine exactly what law is at issue and how that law has changed.

In the final analysis, it is clear that the majority opinion was merely seeking a specific result which can be supported neither by the record nor by the applicable law. Therefore, to achieve the desired outcome, the majority opinion completely avoids any discussion of the evidence or the law. With this irreverent approach to judicial scholarship, I strongly disagree.

B. The Action Filed by Mr. Schiavoni and Mr. Hammer Against Ogden Is Substantially Related to Their Prior Representation of Ogden

Ogden sought to disqualify Mr. Schiavoni and Mr. Hammer as a result of their representation of Ogden during their prior employment with the law firm of Steptoe and Johnson. According to Ogden, Rule 1.9 of the West Virginia Rules of Professional Conduct[3] prohibits Mr. Schiavoni and Mr. Hammer from acting as counsel for Mr. Shaffer in the underlying suit as they had previously represented Ogden in a substantially related matter. I agree.

This Court has previously held that:

> Rule 1.9(a) of the Rules of Professional Conduct, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation.

Syl. pt. 2, *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993).

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[3]Rule 1.9 of the West Virginia Rules of Professional Conduct provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
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> (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
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> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

In the recent decision of *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361 (2001), we further held that:

> Under West Virginia Rule of Professional Responsibility 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Syl. pt. 1, *Keenan*, 210 W. Va. 307, 557 S.E.2d 361. The decision in *McClanahan* also noted that "determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations." Syl. pt. 3, in part, *McClanahan*, 189 W. Va. 290, 430 S.E.2d 569.

In the instant case, the majority opinion simply concludes Mr. Schiavoni's and Mr. Hammer's prior representation of Ogden is not substantially related to the case they filed against Ogden. However, the record could not be more clear and supportive of the opposite conclusion. Mr. Schiavoni and Mr. Hammer's prior representation of Ogden is *substantially* related to the case they filed against Ogden on behalf of Mr. Shaffer. To so conclude, one need look no further than the complaint.

The complaint filed by Mr. Schiavoni and Mr. Hammer on behalf of Mr. Shaffer

states that termination of Mr. Shaffer's employment with Ogden was in violation of the law:

> 12. Defendant's decision to discharge, deny transfer, and refusal to rehire plaintiff was motivated by plaintiff's age and/or plaintiff's record and/or defendant's perception of plaintiff's disability in violation of the West Virginia Human Rights Act.
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> 13. Defendant's decision to discharge, deny transfer, and refusal to rehire plaintiff was motivated by fear that plaintiff may seek Workers' Compensation benefits in violation of the Workers' Compensation Act and the common law of West Virginia.

In essence, Mr. Shaffer brought an action against Ogden alleging his employment termination was discriminatory and in violation of the West Virginia Human Rights and Workers' Compensation Acts.

Mr. Schiavoni's and Mr. Hammer's ability to initiate a discrimination claim against Ogden was squarely addressed in *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 482 S.E.2d 204 (1996) (per curiam) ("*Ogden I*").[4] In *Ogden I*, one of the clients represented by Mr. Schiavoni and Mr. Hammer filed a handicap discrimination claim against Ogden. This Court found that Mr. Schiavoni and Mr. Hammer were disqualified from bringing the handicap discrimination claim because of Mr. Hammer's previous work for Ogden which involved a discrimination issue under the West Virginia Human Rights Act.[5] 198 W. Va. at

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[4]The decision in *Ogden I* was unanimous. At the time that case was decided, Justice Albright was a member of the Court, and he is the only member of the current Court to have participated in that decision.

[5]The decision in *Ogden I* permitted Mr. Schiavoni and Mr. Hammer to represent other (continued...)

592-93, 482 S.E.2d at 209-10.

In the instant proceeding, Ogden has again properly asserted that Mr. Hammer's previous work for Ogden included legal advice involving handicap discrimination under the state's Human Rights Act, as well as discriminatory discharge under the state's Workers' Compensation Act. Ogden also established that Mr. Schiavoni performed work for Ogden that involved age discrimination and workers' compensation discrimination. Consistent with *Ogden I*, it is crystal clear from this evidence that the action filed by Mr. Schiavoni and Mr. Hammer is substantially related to legal matters in which these same attorneys previously had represented Ogden.

Mr. Schiavoni and Mr. Hammer do not dispute that their prior work for Ogden involved the Human Rights Act and the Workers' Compensation Act. However, they contend that "extensive changes" in the law, and the fact that it has been almost ten years since their representation of Ogden, militate in favor of their representation of Mr. Shaffer. The majority opinion blindly accepts both arguments. Neither argument has merit.

Although Mr. Schiavoni and Mr. Hammer contend that there have been "extensive

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[5](...continued)
clients with claims against Ogden that did not pertain to substantially related work that they earlier had performed for Ogden.

changes" in the law, they completely fail to identify any such alterations. Moreover, the majority opinion has failed to provide any evidence of the aforementioned law changes which would be applicable to Mr. Shaffer's case. An examination of the pertinent provisions of the West Virginia Human Rights Act and the West Virginia Workers' Compensation Act reveal no substantive changes in the law since this Court's disqualification of Mr. Schiavoni and Mr. Hammer in the 1996 *Ogden I* decision.

1. Changes in age and handicap discrimination laws under the West Virginia Human Rights Act. The age and handicap discrimination claims Mr. Schiavoni and Mr. Hammer filed on behalf of Mr. Shaffer are contained in W. Va. Code § 5-11-9 (1998) (Repl. Vol. 1999). Although this statute was amended in 1998, such alterations were only cosmetic. That is, the amendments involved substituting the word "disable" in place of the word "handicap," and employing gender neutral language.[6] Clearly, these are not substantive changes. Because these amendments were merely cosmetic, the majority opinion has completely failed to identify and analyze extensive changes such as would support its illogical reasoning.

Also, I find no handicap or age discrimination cases decided by this Court which so changed the law as to permit Mr. Schiavoni and Mr. Hammer to be deemed to meet the

[6]The 1995 amendment also contained gender neutral terms. *See* W. Va. Code § 5-11-9 (1992) (Repl. Vol. 1994).

requirements of Rule 1.9(a) of the West Virginia Rules of Professional Conduct. *See Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W. Va. 91, 538 S.E.2d 389 (2000) (handicap discrimination); *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000) (handicap discrimination); *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 521 S.E.2d 331 (1999) (handicap discrimination); *Bailey v. Norfolk & Western Ry. Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999) (age discrimination); *Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Comm'n*, 206 W. Va. 611, 527 S.E.2d 155 (1999) (per curiam) (age discrimination); *Smith v. Sears, Roebuck & Co.*, 205 W. Va. 64, 516 S.E.2d 275 (1999) (per curiam) (age discrimination); *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463 (1998) (per curiam) (handicap discrimination); *Strawderman v. Creative Label Co., Inc.*, 203 W. Va. 428, 508 S.E.2d 365 (1998) (per curiam) (handicap discrimination); *Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 497 S.E.2d 174 (1997) (handicap discrimination); *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997) (per curiam) (handicap discrimination); *St. Peter v. Ampak-Division of Gatewood Prods., Inc.*, 199 W. Va. 365, 484 S.E.2d 481 (1997) (per curiam) (handicap discrimination); *Barlow v. Hester Indus., Inc.*, 198 W. Va. 118, 479 S.E.2d 628 (1996) (age and sex discrimination); *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) (handicap discrimination). Despite this extensive authority, the majority opinion completely fails to discuss our prior decisions and their impact on this case. These omissions were calculated. Why? Because our prior decisions do not support the proposition that this state's handicap and age discrimination laws have changed so dramatically as to relieve Mr. Schiavoni and Mr. Hammer of their disqualification status and

permit them to represent Mr. Shaffer in his discrimination claims against Ogden.

2. Changes in discharge discrimination laws under the West Virginia Workers' Compensation Act. The Workers' Compensation discharge discrimination claim Mr. Schiavoni and Mr. Hammer brought on behalf of Mr. Shaffer is contained in W. Va. Code § 23-5A-1 (1978) (Repl. Vol. 1998), W. Va. Code § 23-5A-2 (1982) (Repl. Vol. 1998), and W. Va. Code § 23-5A-3 (1990) (Repl. Vol. 1998). These statutes have not been amended since their respective enactments. And though the majority opinion utterly fails to discuss these statutes, it nevertheless incredulously asserts that these laws have undergone dramatic changes.

As with my preceding analysis, I once again find no Workers' Compensation discharge discrimination cases decided by this Court since *Ogden I* which have so changed the law as to permit Mr. Schiavoni and Mr. Hammer to be deemed to meet the requirements of Rule 1.9(a) of the West Virginia Rules of Professional Conduct. *See Nestor v. Bruce Hardwood Floors*, 210 W. Va. 692, 558 S.E.2d 691 (2001) (per curiam); *Nestor v. Bruce Hardwood Flooring*, 206 W. Va. 453, 525 S.E.2d 334 (1999) (per curiam); *Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 518 S.E.2d 650 (1999); *Sayre v. Roop*, 205 W. Va. 193, 517 S.E.2d 290 (1999) (per curiam); *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463 (1998) (per curiam); *Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 490 S.E.2d 678 (1997) (per curiam); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 489 S.E.2d 768 (1997); *St. Peter v. Ampak-Division of Gatewood Prods., Inc*., 199 W. Va. 365,

484 S.E.2d 481 (1997) (per curiam). The majority opinion conspicuously fails to discuss these decisions and their impact on this case. Obviously, this omission was deliberate because our prior decisions do not support the proposition that this state's Workers' Compensation discharge discrimination laws have changed so dramatically as to permit Mr. Schiavoni and Mr. Hammer to continue in their representation of Mr. Shaffer in this regard.

3. Disqualification based upon the passage of time. The only seemingly legitimate basis upon which the majority could have concluded that Mr. Schiavoni and Mr. Hammer were not disqualified is the passage of time argument. While the majority opinion has cited to numerous cases addressing the impact of time on the disqualification of an attorney, none of these decisions hold that the mere passage of time, in and of itself, is sufficient to permit an attorney to sue a former client so as to satisfy the requirements of Rule 1.9(a) of the West Virginia Rules of Professional Conduct. The majority opinion has, in fact, held that, in West Virginia, the passage of time alone is conclusive of whether or not an attorney is disqualified from suing a former client based upon substantially related prior legal work for such former client. I cannot join such an undermining of the integrity of our legal profession as well as such a clear violation of Rule 1.9(a) of the Rules of Professional Conduct.

Finally, Mr. Schiavoni and Mr. Hammer have presented no evidence to show that a change in Ogden's decision-makers has occurred since they terminated such representation.

Insofar as all of the other contentions by the majority opinion are baseless, I believe evidence of a change in decision-makers is imperative to render controlling the passage of time argument. Unfortunately, Mr. Schiavoni and Mr. Hammer have been unable to present such evidence. As stated by Ogden during oral argument, the decision-makers who were in direct contact with Mr. Schiavoni and Mr. Hammer during their tenure as Ogden's counsel continue to be employed by Ogden and serve as its decision-makers.

C. The Majority Opinion Completely Ignores the Doctrine of Stare Decisis

Perhaps the most compelling reason for my dissent from the majority's opinion is its complete and utter disregard of the time-honored judicial tradition of *stare decisis*. Briefly stated, "[*s*]*tare decisis* is the policy of the court to stand by precedent. . . [U]nder the doctrine of *stare decisis*, a case is important only for what it decides--for the 'what' not for 'why' and not for 'how.'" *Banker v. Banker*, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996). *See also Meadows v. Meadows*, 196 W. Va. 56, 64, 468 S.E.2d 309, 317 (1996) ("[T]he doctrine of *stare decisis* counsels that '[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions.'" (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S. Ct. 1772, 1789, 26 L. Ed. 2d 339, 358 (1970))).

According to this principle,

> [a] judicial precedent attaches . . . a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the

> determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

Woodrum v. Johnson, 210 W. Va. 762, 776, 559 S.E.2d 908, 922 (2001) (Albright, J., dissenting) (quoting *Allegheny Gen. Hosp. v. National Labor Relations Bd.*, 608 F.2d 965, 969-70 (3d Cir. 1979) (footnote omitted)). At the heart of this rule is the establishment of certainty for future litigation:

> The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

Booth v. Sims, 193 W. Va. 323, 350 n.14, 456 S.E.2d 167, 194 n.14 (1994) (Miller, Ret. J., dissenting and concurring) (internal quotation and citation omitted). *See also* Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974) ("An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.").

When *Ogden I* was decided, the ultimate conclusion reached by the Court was that Rule 1.9 of the Rules of Professional Conduct precluded attorneys Schiavoni and Hammer from representing a former Ogden employee in an employment discrimination action against

Ogden. The reasoning for this ruling was simple: during the attorneys' prior representation of Ogden, they were privy to confidential information about its employment practices that potentially could be used to Ogden's detriment in the subsequent discrimination litigation. Pursuant to the doctrine of *stare decisis*, "a specific legal consequence [was attached] to [that] detailed set of facts," *Woodrum*, 210 W. Va. at 776, 559 S.E.2d at 922. That is, because Mr. Schiavoni and Mr. Hammer formerly served as counsel for Ogden and obtained information about its employment practices, they cannot now represent Ogden's former employees in employment discrimination proceedings against it. Since this prior ruling is supposed to "furnish[] the rule for the determination of a subsequent case involving identical or similar material facts," *Woodrum*, 210 W. Va. at 776, 559 S.E.2d at 922, the final result of the instant appeal should be the same given that both cases involve the same facts, the same circumstances, and virtually identical parties asserting virtually identical claims. In its infinite wisdom, though, the majority has concluded that the hourglass, and not the doctrine of *stare decisis*, dictates the outcome of this case. I do not agree with this reasoning or with its result.

D. The Pen is Mightier Than the Sword

With a few strokes of the pen, the majority of this Court has begun a new and dangerous chapter in the law governing attorneys' professional conduct. As a result of this decision, attorneys and clients alike will lack the certainty they need to ascertain the propriety of contemplated representation and to recognize conflicts that would preclude such a relationship. My greatest hope would be that this unfortunate page in our jurisprudence would

vanish like disappearing ink so practitioners could regain some semblance of certainty regarding conduct that is both condoned and condemned by the West Virginia Rules of Professional Conduct. Because the present Opinion blurs this distinction rather than providing such guidance, I dissent.

I am authorized to state that Justice Maynard joins me in this concurring and dissenting opinion.